# DOCKET

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No. 83-1075-CFX
Status: GRANTED

Title: Central Intelligence Agency, et al., Petitioners
v.
John Cary Sims and Sidney M. Wolfe

Docketed:
December 29, 1983

Court: United States Court of Appeals for
the District of Columbia Circuit

Vide:
83-1249

Counsel for petitioner: Solicitor General

Counsel for respondent: Levy, Paul Alan

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Nov 4 1983 | | Application for extension of time to file petition and order granting same until December 15, 1983 (Chief Justice, November 9, 1983). |
| 2 | Dec 2 1983 | | Application for further extension of time to file petition and order granting same until December 29, 1983 (Chief Justice, December 5, 1983). |
| 3 | Dec 29 1983 | G | Petition for writ of certiorari filed. |
| 5 | Jan 27 1984 | | Order extending time to file response to petition until February 13, 1984. |
| 6 | Jan 27 1984 | | This extension of time applies to all respondents. |
| 7 | Feb 9 1984 | | Brief of respondents John C. Sims, et al. in opposition filed. |
| 8 | Feb 15 1984 | | DISTRIBUTED. March 2, 1984 |
| 9 | Feb 24 1984 | X | Reply brief of petitioners CIA, et al. filed. |
| 10 | Mar 5 1984 | | Petition GRANTED. Justice Marshall OUT.<br>****************************************************** |
| 11 | Mar 12 1984 | | Record filed. |
| 12 | Mar 12 1984 | | Certified original record & C.A. proceedings- (box) received. |
| 14 | Apr 19 1984 | | Order extending time to file brief of petitioner on the merits until May 19, 1984. |
| 15 | May 18 1984 | | Order further extending time to file brief of petitioner on the merits until June 11, 1984. |
| 17 | May 18 1984 | | Order extending time to file brief of respondent on the merits until August 15, 1984. |
| 18 | Jun 11 1984 | | This case is consolidated with No. 83-1249, Sims v. CIA, and a total of one hour is allotted for oral argument. |
| 19 | Jun 14 1984 | | Brief of petitioner CIA, et al. filed. |
| 20 | Jun 20 1984 | | Joint appendix filed. |
| 21 | Aug 2 1984 | | Order further extending time to file brief of respondent on the merits until August 22, 1984. |
| 22 | Aug 22 1984 | | Brief of respondents John Carey Sims, et al. filed. VIDED. |
| 23 | Oct 22 1984 | | SET FOR ARGUMENT. Tuesday, December 4, 1984. This case is consolidated with No. 83-1249. (2nd case) (1 hour). |
| 24 | Oct 30 1984 | | Supplemental brief of respondents John C. Sims, et al. filed. VIDED. |
| 25 | Nov 1 1984 | | CIRCULATED. |
| 26 | Nov 5 1984 | X | Reply brief of petitioners CIA, et al. filed. |
| 27 | Dec 4 1984 | | ARGUED. |

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# PETITION FOR WRIT OF CERTIORARI

No. 83-1075

Office-Supreme Court, U.S.
FILED
DEC 29 1983
ALEXANDER L. STEVAS,

# In the Supreme Court of the United States

OCTOBER TERM, 1983

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CENTRAL INTELLIGENCE AGENCY
AND WILLIAM J. CASEY,
DIRECTOR OF CENTRAL INTELLIGENCE, PETITIONERS

*v.*

JOHN CARY SIMS
AND SIDNEY M. WOLFE

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTION PRESENTED

Whether the Central Intelligence Agency must disclose the identity of a source of intelligence information under the Freedom of Information Act, despite Exemption 3 of the FOIA and Section 102(d)(3) of the National Security Act of 1947, if the Agency cannot demonstrate that it was necessary to guarantee confidentiality in order to obtain the kind of information that the source supplied.

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# In the Supreme Court of the United States

OCTOBER TERM, 1983

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No.

CENTRAL INTELLIGENCE AGENCY
AND WILLIAM J. CASEY,
DIRECTOR OF CENTRAL INTELLIGENCE, PETITIONERS

*v.*

JOHN CARY SIMS
AND SIDNEY M. WOLFE

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

The Solicitor General, on behalf of the Central Intelligence Agency and the Director of Central Intelligence, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 709 F.2d 95. The opinions and order of the district court (App., *infra*, 21a-34a) are not reported. An earlier opinion of the court of appeals (App., *infra*, 35a-65a) is reported at 642 F.2d 562. One of the earlier opinions of the district court (App., *infra*, 66a-72a) is reported at 479 F. Supp. 84; the other earlier opinion of the district court (App., *infra*, 73a-97a) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on June 10, 1983 (App., *infra*, 19a-20a). A petition for rehearing was denied on August 17, 1983 (App., *infra*, 17a-18a). On November 9, 1983, the Chief Justice extended the time in which to file a petition for a writ of certiorari to December 15, 1983, and on December 5, 1983, the Chief Justice further extended the time in which to file a petition for a writ of certiorari to December 29, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Portions of the Freedom of Information Act, 5 U.S.C. 552, the National Security Act of 1947, 50 U.S.C. 401 *et seq.*, and the Central Intelligence Agency Act of 1949, 50 U.S.C. 403a *et seq.*, are reproduced at App., *infra*, 98a-99a.

## STATEMENT

1. Respondents, invoking the Freedom of Information Act (FOIA), 5 U.S.C. 552, filed a request with the Central Intelligence Agency seeking certain information about a CIA project known as MKULTRA. MKULTRA was initiated in the 1950's in response to concern about foreign nations' "brainwashing" techniques (App., *infra*, 73a). MKULTRA "involved research into 'chemical, biological and radiological materials capable of employment in clandestine operations to control human behavior' " (*id.* at 21a; footnote and citation omitted). This research, funded by the CIA, was conducted by a large number of private scientists, in the United States and abroad, affiliated with universities, research foundations, and similar institutions (*id.* at 66a, 89a). At least 80 institutions and 185 private researchers participated (*id.* at 36a). The nature of MKULTRA, including allegations of abuses connected with it, was explored in 1963 in a report from the Inspector General of the CIA to the Director of Central Intelligence (C.A. App. 118-145) and subsequently by congressional committees and a Presidential commission. See S. Rep. 94-755, 94th Cong., 2d Sess., Bk. I, at 389-392 (1976); *Report to the President by the Commission on CIA Activities Within the United States*, 226 (June 1975). See also *Human Drug Testing by the CIA, 1977: Hearings on S. 1893 Before the Subcomm. on Health and Scientific Research of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. (1977); *Project MKULTRA, the CIA's Program of Research in Behavioral Modification: Joint Hearing Before the Select Comm. on Intelligence and the Subcomm. on Health and Scientific Research of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. (1977).

Respondents sought the grant proposals and contracts awarded under the MKULTRA program and the names of the institutions and individuals that performed research. The CIA made available to respondents all of the grant proposals and contracts. The CIA also contacted the institutions that had performed research, and approximately two-thirds of them agreed to allow their identities to be disclosed. The Agency accordingly disclosed them to respondents. App., *infra*, 39a, 73a-74a.

The CIA cited Exemptions 3 and 6 of the FOIA, 5 U.S.C. 552(b)(3) and (6), as the bases for not releasing the names of the other institutions and the individual researchers. Only the Exemption 3 claim is now at issue. Exemption 3 of the FOIA provides that an agency need not disclose "matters that are * * * specifically exempted from disclosure by statute * * * provided that such statute * * * refers to particular types of matters to be withheld" (5 U.S.C. 552(b)(3)(B)). The statute on which the CIA relied is Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. 403(d)(3), which provides in part:

> [T]he Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure * * *.

2. Respondents then brought this action under the FOIA in the United States District Court for the District of Columbia. See 5 U.S.C. 552(a)(4)(B). They sought to compel disclosure of the names withheld by the CIA. The district court ordered disclosure of these names, apparently reasoning that the term "intelligence sources" in 50 U.S.C. 403(d)(3) did not include the MKULTRA researchers, or if it did, that Section 403(d)(3) was not specific enough to qualify as an Exemption 3 statute (see App., *infra*, 77a-79a).

The court of appeals vacated the district court's order and remanded for reconsideration (App., *infra*, 35a-65a). The court observed that it had consistently held that Section 403(d)(3) "qualifies as a withholding statute under Exemption 3" (App., *infra*, 44a). The court also noted that in its previous decisions it had assumed that the phrase "intelligence sources and methods" has "a plain meaning" (*ibid.*). But upon further consideration of the "relevant statutory enactments" (see *id.* at 47a)—which the court identified as the FOIA, the National Security Act of 1947, and the Central Intelligence Agency Act of 1949, 50 U.S.C. 403a *et seq.*, (App., *infra*, 47a)—the court concluded that the phrase "intelligence sources and methods" is in fact "ambiguous" (*id.* at 49a) and must be interpreted in a way that reflects "Congress' sensitivity to the need for discrimination in identifying particular types of matters exempted from disclosure" (*id.* at 47a).

The court of appeals acknowledged that the CIA's proposed definition of "intelligence sources"—essentially, individuals or entities that provide intelligence information (see App., *infra*, 46a)—was a supportable interpretation of the phrase. In fact, the court remarked that the agency's definition was of "equal plausibility" with the definition that the court attributed to respondents—"that persons are * * * protected intelligence sources only if nondisclosure of their identities would * * * be justifi[ed] on national security grounds" (*id.* at 49a). But instead of accepting either of these definitions the court decided that "[a]nalysis should * * * focus on the practical necessity of secrecy * * * [and should] avoid an overbroad discretionary standard" (*id.* at 50a). The court then concluded (*ibid.*):

> [A]n "intelligence source" is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

3. On remand, the district court specifically rejected respondents' contention that the MKULTRA research was not "needed to perform the CIA's intelligence function" (App., *infra*, 22a). The court explained (*id.* at 22a-23a): "In view of the agency's concern that potential foreign enemies could be engaged in similar research and the desire to take effective countermeasures, * * * [the Agency] could reasonably determine that this research was needed for its intelligence function."

The district court accordingly concluded that the "crucial issue" was the application of the court of appeals' requirement that the CIA show that it could not have reasonably expected to obtain the information supplied by the sources in issue without guaranteeing confidentiality to them (App., *infra*, 23a). The court acknowledged that the Agency considered the relationships between it and the MKULTRA researchers to be confidential (*ibid.*). The court further noted that "[f]or understandable reasons, the Agency wished its interest in this subject matter kept secret, and feared that disclosure would jeopardize its ability to continue its research" (*id.* at 24a). But the court ruled that this was not sufficient to satisfy the court of appeals' test because "the chief desire for confidentiality was on the part of the CIA. * * * [C]onfidentiality was normally guaranteed * * * solely to protect the CIA" (*ibid.*).

After reviewing the Agency's submissions about particular cases, the district court noted that some of the researchers had sought, and received, express promises of confidentiality from the Agency. The court ruled that the identities of these researchers need not be disclosed. App., *infra*, 26a. In total, the court ordered the disclosure of the names of about half of the researchers and all of the institutions that had not already been revealed (*id.* at 21a-34a).

4. Both sides appealed, and a divided panel of the court of appeals reversed the district court's "determination regarding which of the individual researchers satisfy the 'need-for-confidentiality' portion of the definition of 'intelligence source' promulgated in" the court of appeals' earlier opinion. The court affirmed the district court's ruling in other respects. App., *infra*, 11a.

The court of appeals peremptorily rejected the Agency's suggestion that it reconsider the portion of the definition requiring the Agency to show that it had to guarantee confidentiality in order to obtain the information supplied by a source (App., *infra*, 4a). Instead, the court of appeals criticized the district court for not following this aspect of the definition closely enough. The court of appeals remarked that "the [district] court's attention to questions of this order was deflected by its interest in whether the agency had, in fact, promised confidentiality to individual researchers" (*id.* at 5a). The court held that the district court's decision automatically to exempt from disclosure those researchers to whom the CIA had promised confidentiality was erroneous: "Proof that the CIA did or did not make promises of secrecy (either express or tacit) to specific informants * * * [cannot] be dispositive of the question whether a given informant qualifies as an 'intelligence source'" (*id.* at 6a).

Specifically, the court of appeals ruled that even an intelligence source who received an express promise of confidentiality would have to be revealed if the source requested such a promise only becase he was "unreasonably and atypically leery of providing the agency with innocuous information" (App., *infra*, 6a). The court reasoned that "if the agency readily and openly could have obtained, from other sources, data of the sort [such a source] provided, he would not constitute an 'intelligence source'" (*ibid.*; footnote omitted). The court also remarked that if the Agency could refuse to disclose the identities of all sources of intelligence that requested confidentiality, it "would [be] * * * easy for the agency to seek shelter in exemption 3 by simply 'suggesting' to all of the persons with whom it deals that they sign a form expressing their desire for secrecy" (*id.* at 6a n.7).

Judge Bork wrote a separate opinion, concurring in part and dissenting in part (App., *infra*, 12a-16a). He dissented from the majority's conclusion that the FOIA sometimes requires the CIA to break a promise of confidentiality it has given to an intelligence source. Judge Bork stated (*id.* at 13a-14a):

> Many persons who expect pledges of confidentiality to be honored will be shocked to learn, long after they give information in return for such a promise, that their identities will be disclosed. * * * [I]n this very case, retrospective application of [the majority's definition] * * * may be profoundly unjust. It will certainly be so if it results in the disclosure of the identities of * * * researchers who fully, and justifiably, expected the government to keep its commitment and protect them from the wide range of dangers that may have concerned them when they insisted on confidentiality. This is not an honorable way for the government of the United States to behave, and the dishonor is in no way lessened because it is mandated by a court of the United States.

Judge Bork also urged that by authorizing courts to force the CIA to break its promises of confidentiality, the majority's approach "produces pernicious results. * * * Because of the ever-present possibility of a future breach of trust ordered by the judiciary under the vague standard laid down today, the CIA will probably lose many future sources of valuable intelligence" (App., *infra*, 13a-14a). Judge Bork reasoned that under the court of appeals' definition of "intelligence sources," "individuals who give information to the CIA on the understanding that their names will be kept secret cannot rely on the promise of confidentiality if the information turns out to be the sort the CIA can get elsewhere without promising secrecy, something the sources of the information will often not be in a position to know. There is, moreover, no guarantee that a judge, examining the situation years later and deciding on the basis of a restricted record, will come to an accurate conclusion" (*id.* at 13a). Judge Bork then concluded (*ibid.*):

> The CIA and those who cooperate with it need and are entitled to firm rules that can be known in advance rather than vague standards whose application to particular circumstances will always be subject to judicial second-guessing. Our national interest, which is expressed in the authority to keep intelligence sources and methods confidential, requires no less.

Judge Bork also criticized other aspects of the court of appeals' definition of "intelligence sources." Judge Bork urged that there is "no reason to think that section

403(d)(3) was meant to protect sources of information only if secrecy was needed in order to obtain the information." Specifically, Judge Bork explained, "[t]he mere fact that the CIA pursues certain inquiries tells our adversaries much that there is no reason to think Congress intended them to know." He reasoned that "[o]ne need not be an expert in intelligence work to know that it is often possible to deduce what a person is doing, thinking, or planning by knowing what question he is asking or what information he is gathering. That is true even when the answers and information are publicly available." App., *infra*, 15a.

The court of appeals denied the CIA's petition for rehearing and suggestion of rehearing en banc. Judges Wilkey, Bork, and Scalia voted in favor of rehearing en banc. App., *infra*, 17a-18a.

## REASONS FOR GRANTING THE PETITION

The court of appeals' definition of "intelligence sources" reflects an abstract and unrealistic approach that fails to appreciate the extraordinary importance of protecting the identities of those who provide intelligence information to the CIA and the CIA's many legitimate reasons for maintaining the confidentiality of such sources. The court of appeals would require the CIA to reveal its sources of intelligence in many instances in which such disclosures would seriously impair the Agency's ability to perform its mission. For example, the court of appeals' definition would require the Agency, in certain circumstances, to betray explicit promises of confidentiality; to disclose the public sources it is exploiting, even if doing so will reveal the nature of highly sensitive CIA investigations and projects; and possibly to disclose the identities of even very sensitive sources, if those sources also provide information that the CIA could have obtained without promising confidentiality.

Even apart from the intelligence sources that would actually be compromised because of the court of appeals' definition, that definition would create great uncertainty about the Agency's ability to protect sources and to promise protection to potential sources. Such uncertainty itself would have serious practical effects on the Agency's ability to gather and analyze intelligence. "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the *appearance* of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980), quoted in *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (emphasis added). For these reasons, the court of appeals' definition threatens to cause significant practical harm to the nation's intelligence operations.

The court of appeals' definition is also wholly without foundation in the law. The National Security Act makes the Director of Central Intelligence responsible for maintaining the secrecy of "intelligence sources." That term should be given its plain meaning—sources of intelligence. That is, the Director of Central Intelligence is responsible for protecting all sources of information in which the CIA is legitimately interested.

There is no basis for the court of appeals' more restrictive definition. The court appears to have relied on what it considered to be the pro-disclosure policies of the FOIA instead of interpreting the National Security Act of 1947—a statute passed in a different era, for different purposes, by a Congress that was concerned to assure the secrecy of the very kinds of matters that the court of appeals would now make public. Especially because any party seeking CIA records can take advantage of the court of appeals' definition by bringing suit in the District of Columbia Circuit (see 5 U.S.C. 552(a)(4)(B)), further review is warranted.

1. a. The court of appeals' approach would require the government to disclose its intelligence sources in many circumstances in which it is entirely clear that disclosure will interfere with the Agency's ability to carry out its mission. Perhaps the most egregious example is the one explicitly avowed by the court of appeals in its second opinion. As that opinion states, the court of appeals' definition would require the CIA to betray an express promise of confidentiality if a court determines, after the fact, that the Agency could have obtained the same type of information without giving such a promise—or, in the court of appeals' words, if

a court decides that the intelligence source to whom the promise was given sought the promise only because he was "unreasonably and atypically leery" of cooperating with the CIA (App., *infra*, 6a).

It is readily apparent that if the CIA is forced to break promises of confidentiality, its ability to recruit intelligence sources will be impaired. This will be true even if promises are broken only to sources that a judge decides were "unreasonably and atypically leery" about cooperating with the CIA. A person who decides to cooperate with the CIA by becoming a source of intelligence often incurs a substantial risk; if his cooperation becomes known, he may face not only great embarrassment but far more severe consequences. See *Haig* v. *Agee*, 453 U.S. at 285 & n.7. Consequently, in order to induce persons to cooperate, the CIA frequently must provide as absolute an assurance of confidentiality as it possibly can.[1] "The continued availability of * * * [intelligence] sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger [their] personal safety" (*Snepp* v. *United States*, 444 U.S. at 512).

Few things are likely to have as devastating an impact on the Agency's ability to recruit intelligence sources as the perception that the Agency cannot keep its promises because a court may someday order it to break them. Many

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[1] The assurance of confidentiality given to an intelligence source is, of course, seldom recorded in writing, and often it is not even explicit. It is usually so obvious to all concerned that the source wants to remain confidential that no explicit understanding is needed; an assurance of confidentiality is implicit in the relationship between the Agency and the source. For this reason, the practical damage caused by the court of appeals' definition would not be greatly reduced even if it were amended so as to require courts to honor fully explicit promises of confidentiality. In any event, the court's most recent opinion—in particular, its criticism of the district court and its rejection of Judge Bork's position— constitutes an unequivocal refusal to consider such an amendment.

Moreover, the CIA obtains much valuable intelligence from unwitting sources—sources who reveal information to a person who is, unbeknownst to the source, a CIA contact. It is obviously artificial to analyze the CIA's interest in protecting the identities of such sources in terms of assurances of confidentiality.

potential intelligence sources—especially those who are not American citizens—are likely to perceive courts as unpredictable institutions that are influenced by concerns that have little in common with the world in which the potential source and his CIA contact must operate. A potential source is also likely to realize that a court's decision whether to reveal his cooperation with the Agency may occur well in the future, at a time when the source's concern for confidentiality may seem less understandable to everyone except the source himself.

It will certainly not reassure a potential intelligence source to learn that a court will order his identity revealed only if it determines that he was "atypically or unreasonably leery" and that the Agency could have obtained the same information from a public source. An intelligence source will "not be concerned with the underlying rationale for disclosure of" his cooperation with the CIA if his cooperation was secured "under assurances of confidentiality" (*Baldrige* v. *Shapiro*, 455 U.S. 345, 361 (1982)). Moreover, a court's determination whether an intelligence source will be harmed if his identity is revealed will often require complex political, historical, and psychological judgments, sometimes about societies very different from our own.[2] There is no reason for anyone—especially a potential intelligence source whose life may be at stake—to have great confidence in a court's ability to make those judgments correctly.

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[2] In *Fitzgibbon* v. *CIA*, Civil Action No. 79-0956 (D.D.C. Nov. 10, 1983), motion for reconsideration pending, for example, a district court applying the court of appeals' definition of "intelligence sources" has ordered the disclosure of CIA sources in the Dominican Republic on the basis of judgments such as these: only the Trujillo regime, which has been deposed, would have taken action against these sources (slip op. 29 n.50); the current regime is "stable" and "has disavowed all ties with Trujillo's politics, attitudes and methods" (*ibid.*); since Trujillo and his police chief are dead, the sources need not fear retaliation from individuals sympathetic to Trujillo (*id.* at 33 n.60); and indeed "[m]any of the sources * * *, far from being embarrassed by revelation, might well be thought to be popular, particularly in the Dominican Republic, for having helped, no matter how slightly, to work against the dictator now unpopular and scorned" (*id.* at 34 n.61).

Leading experts on the politics and culture of a society are likely to differ on the extent to which generalizations like these are accurate. Plainly a court should not be in a position of having to make such judgments.

For several reasons, it is no answer to say that even under the court of appeals' definition, few courts are likely actually to order the government to breach an express promise or otherwise to disclose a sensitive intelligence source. First, the court of appeals' second opinion shows that it is entirely serious about ordering the disclosure of intelligence sources, even in the extreme case in which there has been an express promise of confidentiality. And, as we have noted (page 11 note 2, *supra*), a district court applying the court of appeals' definition has already ordered the disclosure of certain foreign intelligence sources.

More important, there is no question that the court of appeals' definition greatly increases the likelihood of a court-ordered disclosure; and the possibility of such a disclosure alone can have extremely damaging effects, because it gives rise to the *perception* that the CIA cannot be trusted to keep a source's identity secret. As this Court has recognized in both the intelligence area and other contexts, what is crucial is not only whether the government has in fact betrayed a confidence but "the *appearance* that confidentiality ha[s] been breached" or might be breached (*Baldrige* v. *Shapiro*, 455 U.S. at 361 n.17 (emphasis in original)). "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all" (*Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981)). This is especially true in the area of intelligence gathering, where the risks are enormous. By creating the appearance that the CIA cannot protect its sources—and by making it clear that the Agency will sometimes be required to breach even an explicit promise of confidentiality—the court of appeals' opinion creates a serious potential threat to the CIA's ability to perform the important task assigned to it by Congress.

b. Even if all of these concerns were unjustified—even if the court of appeals' definition had no effect on the Agency's ability to recruit intelligence sources—that definition would still threaten serious potential harm to the Agency's interests. That is because—as Judge Bork pointed out—the court of appeals' definition explicitly requires the Agency to reveal any *public* sources of intelligence, since a guarantee of confidentiality is not needed to obtain information from a public source.

Disclosures of the public sources that the Agency is exploiting can damage the Agency in obvious ways. As Judge Bork explained, another government can learn a great deal about "what subjects [are] of interest to the CIA" by examining the public sources of information that the Agency is using:

> One need not be an expert in intelligence work to know that it is often possible to deduce what a person is doing, thinking, or planning by knowing what question he is asking or what information he is gathering. That is true even when the answers and information are publicly available. The mere fact that the CIA pursues certain inquiries tells our adversaries much that there is no reason to think Congress intended them to know.

App., *infra*, 15a.

The facts of this case themselves suggest an example. When the CIA decided to investigate "brainwashing" and the countermeasures that might be taken, it might well have turned to sources, such as journals and ongoing research projects, that are available to the public. But a foreign government that learned the sources that the Agency was consulting would have been able to infer both the general nature of the CIA's project and the directions that its research was taking.

Similarly, the court of appeals, in its first opinion, suggested that the excessive breadth of the CIA's proposed definition of "intelligence sources" was revealed by the Agency's acknowledgment that its definition would "apply even to periodicals—including *Pravda* and the *New York Times*—from which [the Agency] culls information that informs its view of foreign nations and their policy intentions" (App., *infra*, 46a). But the disclosure that the CIA consults *Pravda* and the *New York Times* is innocuous not because those periodicals are publicly available but because it is the disclosure of a fact—the fact that the Agency consults these newspapers—that is already commonly assumed to be true. An obscure Eastern European technical journal might also be available to members of the public; but disclosure of the fact that the CIA subscribes to that journal could easily thwart the CIA's efforts to exploit its value as an intelligence source.[3]

In this respect, as well, the court of appeals' definition is harmful not only because it will force certain disclosures but because of the prospective effect it will have on the CIA's operations. If the Agency knows that it will be required to reveal its sources of public information in response to a proper FOIA request, it can be expected to alter its techniques so as to reduce the damage that such a disclosure might cause. In this way, the court of appeals' definition will force the CIA to depart from what it considers the best use of "intelligence sources and methods" out of concern that some of those sources and methods might become public. This is precisely what Congress was seeking to avoid when it authorized the Director of Central Intelligence to maintain the secrecy of intelligence sources and methods.

c. Finally, the court of appeals apparently failed to recognize that many intelligence sources will provide the CIA with both highly sensitive information—of a kind that would never be supplied without a promise of confidentiality—and public or "innocuous" information that the Agency could have obtained elsewhere without guaranteeing secrecy. For example, a source in a foreign nation might supply, in addition to much sensitive information, a report of a crop failure that American journalists also learned about and reported in newspapers. If an FOIA request were then filed for all sources of information about the crop failure, the court of appeals' definition might be interpreted to require the Agency to disclose its relationship with the sensitive foreign source—even though that disclosure would be likely to damage both the Agency and the source.

A district court applying the court of appeals' definition has recently interpreted it in precisely this way (*Fitzgibbon* v. *CIA*, Civil Action No. 79-0956 (D.D.C. Nov. 10, 1983), slip op. 23 n.35, motion for reconsideration pending):

> Under [the court of appeals' definition], a document reporting on a conversation between a CIA agent and a source on a wholly innocuous subject would not be protected even if the source is a highly placed official of a government hostile to the United States. Because of its innocuousness, the information presumably could have been obtained from any number of individuals without a promise of confidentiality * * *.

While we do not acquiesce in this interpretation of the court of appeals' opinion, the opinion is clearly susceptible of such a reading; obviously, even a possibility that such disclosures might occur would seriously damage the government's ability to gather intelligence.

2. a. The court of appeals' definition is also wholly without foundation in the law. The court did not appear to deny that the MKULTRA researchers were, literally, sources of intelligence; the district court specifically ruled that the Agency "could reasonably determine that [the MKULTRA] research was needed for its intelligence function" (App. *infra*, 22a-23a), and the court of appeals did not question this ruling. Thus, the MKULTRA researchers were "intelligence sources" within the literal meaning of that term.

That should have been the end of the inquiry. 50 U.S.C. 403(d)(3) protects "intelligence sources and methods from unauthorized disclosure." There is no reason to believe that

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[3] In addition, much information that is publicly available in principle can be difficult to obtain from public sources, and far more easily obtained from sources whose identity both the source and the Agency legitimately wish to protect. An example of such information might be details of the travel plans or financial transactions of an individual whom the CIA is observing. It might be far more difficult to obtain such information from a public source than from a source who would cease to provide it if his identity were revealed; but the court of appeals would apparently require the disclosure of such a source's identity, since the information was available by means that did not involve a guarantee of confidentiality.

Congress meant these words to have something other than their plain meaning—that all sources of intelligence are protected from disclosure.[*] Congress did not say—as the court of appeals would suggest—that the Director of Central Intelligence is authorized to protect intelligence sources only if such protection is needed to obtain information that otherwise could not be obtained. Nor did Congress say that only confidential or nonpublic intelligence sources are protected. Cf. 5 U.S.C. 552(b)(7)(D); 5 U.S.C. 552a(k)(2) and (5). Congress simply protected all sources of intelligence.

In fact, the legislative history of Section 403(d)(3) shows that Congress was specifically made aware of the kinds of intelligence sources that the court of appeals' definition would require to be disclosed, and Congress did not exclude such sources from the protection of Section 403(d)(3). General Vandenberg, who had been Director of the Central Intelligence Group, the CIA's predecessor (see 11 Fed. Reg. 1337 (1946)), explained to a Senate committee considering the bill that became the National Security Act that "roughly 80 percent of intelligence should normally be based" on "the great open sources of information * * * such things as books, magazines, technical and scientific surveys, photographs, commercial analyses, newspapers, and radio broadcasts, and general information from people with a knowledge of affairs abroad." *National Defense Establishment: Hearings on S. 758 Before the Senate Comm. on Armed Services*, 80th Cong., 1st Sess., Pt. 3, 492 (1947). Indeed, General Vandenberg asserted that this kind of intelligence had been neglected before World War II and urged that it be a principal concern of the post-war agency (*ibid.*). Thus, when Congress gave the Director of Central Intelligence unequivocal authority to "protect[ ] intelligence sources

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[*] As the District of Columbia Circuit itself remarked, on one occasion when the definition it devised in this case apparently had not been brought to its attention: "The Freedom of Information Act bars the courts from prying loose from the government even the smallest bit of information that * * * would disclose intelligence sources or methods." *Afshar* v. *Department of State*, 702 F.2d 1125, 1130 (1983) (McGowan, J.).

and methods from unauthorized disclosure," it had previously been informed by the Director's predecessor that the great preponderance of intelligence sources would be public sources. In these circumstances, Congress must have intended the Director's authority to extend to public sources.

Similarly, Admiral Inglis, then Chief of Naval Intelligence, testified in executive session hearings that were only recently declassified (*National Security Act of 1947: Hearings on H.R. 2319 Before the House Comm. on Expenditures in the Executive Departments*, 80th Cong., 1st Sess. (1947)), that intelligence agents in foreign countries are often used to "confirm or not what we have deduced from * * * Russian propaganda broadcasts" (*id.* at 63). Thus, Congress, unlike the court of appeals, must have recognized that highly secret intelligence sources will sometimes also report information that the CIA can obtain, or has obtained, from open sources. It is inconceivable that Congress, after having received Admiral Inglis's testimony, would have decided to deny the Director of Central Intelligence the authority to protect agents who function in this way.

b. The court of appeals' rationale for its restrictive definition of "intelligence sources" is unclear. The court appeared to believe that its definition was "functional" and "focus[ed] on the practical necessity of secrecy" (App., *infra*, 56a). But as we have shown—and as Congress was made aware—secrecy can be a "practical necessity" in many circumstances in which the court of appeals would order disclosure. The court of appeals' implicit premises—that the only reason to maintain the secrecy of a source is to ensure that it will continue to provide information, and that it is therefore unnecessary to protect a source if the information it supplies is available elsewhere—are simply incorrect. Secrecy in the intelligence area has many other functions.

The court of appeals also suggested that 50 U.S.C. 403g was relevant to determining the scope of Section 403(d)(3). Section 403g exempts the CIA from "the provisions of any * * * law which require[s] the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency * * *." See App., *infra*, 99a. But Section 403g deals only with employees of the CIA, and many of the most sensitive sources are not Agency employees. Thus, it cannot plausibly be suggested that Section 403g exhausts the categories of information about intelligence sources that the Director is authorized to protect.

Indeed, the legislative history of Exemption 3 of the FOIA explicitly mentions Section 403(d)(3)—not just Section 403g—and shows that Congress specifically viewed Section 403(d)(3) as a principal example of the kind of statute to which Exemption 3 refers. See H.R. Rep. 94-880 (Pt. II), 94th Cong., 2d Sess. 15 n.2 (1976); H.R. Rep. 93-1380, 93d Cong., 2d Sess. 12 (1974); S. Rep. 93-854, 93d Cong., 2d Sess. 16 (1974). See also S. Rep. 98-305, 98th Cong., 1st Sess. 7 n.4 (1983). In fact, the breadth of Section 403g shows Congress's acute concern to keep all aspects of the CIA's operations confidential. Under Section 403g, for example, it is plain that MKULTRA researchers who happened to be CIA employees need not be disclosed.

*c.* But the court of appeals' most fundamental error was to permit what the court considered to be the pro-disclosure philosophy of the FOIA to influence its interpretation of Section 403(d)(3) (*see*, *e.g.*, App., *infra*, 41a-45a, 47a, 50a). This approach is wholly misconceived. Exemption 3 "incorporat[es] by reference exemptions contained in [the] * * * statutes" it identifies. H.R. Conf. Rep. 94-1441, 94th Cong., 2d Sess. 14 (1976); see *id.* at 25. The court of appeals acknowledged that 50 U.S.C. 403(d)(3) is an Exemption 3 statute (App., *infra*, 44a);[8] as we have noted, the legislative history of Exemption 3 establishes that proposition beyond any doubt.

Thus, the *only* question is what Congress intended by use of the term "intelligence sources and methods" when it enacted 50 U.S.C. 403(d)(3). Section 403(d)(3) was passed in 1947—a time when the prevailing attitudes toward both

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[8] See also *Gardels* v. *CIA*, 689 F.2d 1100, 1107 (D.C. Cir. 1982); *Goland* v. *CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980); *National Commission on Law Enforcement and Social Justice* v. *CIA*, 576 F.2d 1373, 1376 (9th Cir. 1978).

secrecy and the intelligence services were far different from what they were when the FOIA was enacted and amended. The court of appeals identified nothing in the language or legislative history of Section 403(d)(3) suggesting that Congress intended to depart from the plain meaning of the term and adopt the restrictive definition that the court devised.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1983

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 82-1945

JOHN CARY SIMS, ET AL.

v.

CENTRAL INTELLIGENCE AGENCY, APPELLANT

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No. 82-1961

JOHN CARY SIMS, ET AL., APPELLANTS

v.

CENTRAL INTELLIGENCE AGENCY,
ADMINISTRATOR, STANSFIELD TURNER

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Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action 78-2251)

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Argued April 20, 1983
Decided June 10, 1983

Before EDWARDS and BORK, *Circuit Judges*, and FAIRCHILD,* *Senior Circuit Judge* for the Seventh Circuit.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Separate statement, concurring in part and dissenting in part, filed by *Circuit Judge* BORK.

EDWARDS, *Circuit Judge*: This decison marks the end of another inconclusive chapter in a course of litigation that has already been unduly prolonged. In 1977-1978, the appellants filed first a request and then a suit under the Freedom of Information Act, 5 U.S.C. § 552 (1976 & Supp. V 1981) ("FOIA"), seeking disclosure by the CIA of the names of the institutions and individuals who, in the late 1950's and early 1960's, had conducted secret research for the CIA under its so-called MKULTRA program. The grisly details of the situation that gave rise to the appellants' request, and the history of the agency's responses to their demand, are recounted in our prior decision in the case, reported at 642 F.2d 562 (D.C. Cir. 1980). For present purposes, we need only highlight the critical events associated with this litigation.

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*Sitting by designation pursuant to 28 U.S.C. § 294(d) (Supp. V 1981).

The CIA refused to reveal most of the information that was initially requested by the appellants. In defense of its recalcitrance, the agency invoked exemptions 3[1] and 6[2] of the FOIA; however, agency officials expressly renounced reliance on exemption 1.[3] After affording the CIA several opportunities to present evidence in support of its positions, the District Court rejected both of the arguments advanced by the agency. On appeal, a panel of this court upheld the District Court's disposition of the CIA's exemption 6 argument. The panel concluded, however, that the trial court's analysis of the agency's exemption 3 defense was hampered by the unavailability of a coherent definition of an "intelligence source"within the meaning of the National Security Act.[4] Accordingly, the court formulated a definition of that crucial phrase and remanded the case for reconsideration of the agency's argument in light of its holding. *Sims v. CIA* [*Sims I*], 642 F.2d 562, 571-72 (D.C. Cir. 1980).

On remand, the District Court invited the CIA to submit evidence that would indicate which of the institutions and individuals whose identities the agency sought to withhold fell within the prescribed definition of "intelligence source." The CIA's responses were neither thorough nor prompt.[5] Eventually, however, the trial court did succeed in assembling a significant body of relevant information. After examining and analyzing the parties' various submissions, the court issued two opinions separating the individuals and institutions into various categories, determining whether the members of each group satisfied the definition of "intelligence source," and ordering disclosure of the identities of those who failed to qualify. Memorandum Opinion, Dec. 22, 1981, *reprinted in* Appendix ("App.") 27-34; Memorandum Opinion, June 15, 1982, *reprinted in* App. 35-40.

Almost all of the District Court's various rulings were judicious and proper. One aspect of its analysis, however, was flawed; the court misconceived the level of generality at which the definition of "intelligence source" should apply. We are obliged, therefore, to reverse that portion of the District Court's judgment and remand the case for further proceedings.

## I.

*Sims I* defined an "intelligence source" as:

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[1] Exemption 3 authorizes withholding of "matters that are . . . specifically exempted from disclosure by statute (other than [5 U.S.C. § 552b]), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3) (1976). In invoking this provision, the CIA relied on the well-established rule that § 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3) (1976), which provides that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure," meets the statutory requirements. *See, e.g., Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982).

[2] Exemption 6 authorizes withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1976).

[3] Exemption 1 authorizes withholding of "matters that are . . . (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (1976).

[4] *See* note 1 *supra*.

[5] The CIA never complied with the District Court's repeated suggestions that, in order to obtain some evidence of the status of the individual researchers, the agency should contact them and ascertain their understanding of the terms of their past relationship with the CIA.

> a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

642 F.2d at 571. It is beyond dispute that the foregoing definition constitutes both the law of the case and the law of this circuit. The only reason for the reversal of the District Court's decision in *Sims I* was to allow the trial court on remand to reconsider, on the basis of this definition, its evaluation of the CIA's invocation of exemption 3. *See id.* at 571-72. Clearly, therefore, the definition itself is part of the holding of the *Sims I* decision.

Moreover, since the issuance of *Sims I*, the court has had an opportunity once again to consider the meaning of "intelligence source"; in *Holy Spirit Association for the Unification of World Christianity v. CIA*, 636 F.2d 838, 844 (D.C. Cir. 1980), *other portions of the decision vacated and remanded as moot*, 455 U.S 997 (1982), a second panel expressly reaffirmed the definition enunciated in *Sims I*.[6] Thus, the argument advanced by the agency on this appeal—that the last clause of that definition should be regarded as mere dictum, the validity of which is subject to reevaluation by the present panel at this juncture—is either disingenuous or obtuse.

## II.

Unfortunately, the District Court on remand failed to adhere to the instructions in *Sims I* regarding the manner in which the definition of "intelligence source" should be applied. In *Sims I*, it was made clear that the first thing the trial court should do is define "the class or 'kind' of information involved." 642 F.2d at 571. Such a determination, it was indicated, would make it possible for the court then to assess "the likelihood that disclosure would undermine CIA access to information *of that kind*." *Id.* (emphasis added). In *Holy Spirit Ass'n* (issued prior to the District Court's

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[6] *See also McGehee v. CIA*, 697 F.2d 1095, 1112 n.78 (D.C. Cir. 1983) (reiterating our commitment to the definition).

decisions on remand), the court again emphasized that application of the definition of "intelligence source" requires an identification of the "type" of information that was provided by a particular source. 636 F.2d at 844. After such a determination has been made, the trial court can and should consider whether the agency could reasonably expect to obtain information *of that type* without guaranteeing its providers confidentiality. *See id.*

We do not mean to suggest that the District Court simply ignored or totally misconstrued the holding of *Sims I*. Some comments in the District Court's memorandum opinions do reflect an attempt first to identify the types of information involved in the MKULTRA program and then to assess the ease with which the agency could obtain data of those types without pledging its sources secrecy. Thus, at one point, the court observed:

> [F]or many of the subprojects, even assuming that a guarantee was given, it is doubtful at best whether it was necessary. Examples include Subproject No. 104, research on the ecological relations involved in the deterioration of petroleum products; No. 92, an exploration of the usefulness of mechanization in foreign language training; No. 112, a study of current problems in vocational guidance; No. 111, a study of the measurement of motivation; No. 96, a study of the psychology of personal constructs as it applies to foreign cultures; No. 123, a study of emerging ethnic images in three countries; No. 84, a study of high motivation by development of specific interpersonal relationships; and No. 85, a study of blood groupings as a means of identifying individuals. It seems clear that such research, which goes on constantly at many places, could have been done without a guarantee of confidentiality. At least, the defendant has provided no evidence to rebut this inference.

Dec. 22 Opinion at 5-6, *reprinted in* App. 31-32. Unfortunately, the court's attention to questions of this order was deflected by its interest in whether the agency had, in fact, promised confidentiality to individual researchers. The court's concern over whether such specific promises were made seems to have derived from its belief that "[a] necessary prerequisite to the satisfaction of [the third] portion of the definition is that the CIA have in fact made a guarantee of the confidentiality of the source; obviously if no guarantee was given, and the information was nonetheless obtained, then, under the Court of Appeals' definition, no guarantee was necessary." *Id.* at 3, *reprinted in* App. 29.

Proof that the CIA did or did not make promises of secrecy (either express or tacit) to specific informants would undoubtedly be helpful to a court when deciding whether the agency could expect to obtain information of the kind they provided without guaranteeing confidentiality to sources of it. Evidence that data was obtained despite the fact that the agency failed or refused to pledge secrecy to a source would certainly give rise to an inference that, in general, the agency is capable of securing data of that type without providing guarantees of confidentiality. Conversely, a pledge of secrecy made by the CIA would be probative at least of the agency's belief that the source desired anonymity. But, in neither case could such evidence be dispositive of the question whether a given informant qualifies as an "intelligence source." A particular researcher may have been atypically unconcerned with his reputation or safety; that he was willing to provide information without a promise of confidentiality does not mean that, in general, the agency could obtain information *of the kind* he provided without guaranteeing confidentiality to sources of it. Conversely, an informant may have been unreasonably and atypically leery of providing the agency with innocous information; if the agency readily and openly could have obtained, from other sources, data of the sort he provided, he would not constitute an "intelligence source."[7] In short, it

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[7] A further reason for not automatically allowing the CIA to shield the identities of informants who request anonymity is the possibility of collusion between the agency and its sources. A rule that any informant who asks for a guarantee of confidentiality qualifies as an "intelligence source" (regardless of the nature of the information he provides) would make it easy for the agency to seek shelter in exemption 3 by simply "suggesting" to all of the persons with whom it deals that they sign a form expressing their desire for secrecy and then memorializing its accession to their "requests."

was error for the District Court to rule that those six researchers who apparently did request confidentiality automatically qualified as "intelligence sources" and that those who did not request such a pledge automatically did not qualify.[8]

The dissent objects to the foregoing explication of the *Sims I* definition on the grounds of both "precedent and common sense." With regard to "common sense," we think that the marginal risk that a few persons, who provided the agency with information it readily could have obtained elsewhere but who nevertheless requested a promise of confidentiality, might be surprised to learn that their identities could not be shielded under exemption 3 is more than offset by two considerations. First, there is the serious potential for widespread evasion of the letter and spirit of the FOIA that would be created by the rule advocated by the dissent. *See* note 7 *supra*. Second, there is the fact that, if revelation of the identity of a source of information would in any way impair national security, the agency can easily justify withholding his name by invoking exemption 1 of the Act.

The dissent's reliance upon "precedent" warrants a more extended response. The dissent makes much of the sentence used by a panel of this court in *Holy Spirit Ass'n*, pointing to the fact that information contained in three of the documents at issue in that case had been obtained from "persons who gave [the] information with the understanding that it would be kept in confidence." 636 F.2d at 844. The dissent concludes that the foregoing reference establishes as the law of this circuit that "an informant-solicited promise of secrecy . . . automatically qualif[ies] the informant as an intelligence source." We find this suggestion to be quite extraordinary.

For two reasons, the language from *Holy Spirit Ass'n* cannot possibly support the weight the dissent would place upon it. First, the panel in *Holy Spirit Ass'n* never intimated that proof that the agency promised a source secrecy conclusively establishes that the promisee was an "intelligence source." Indeed, the court did not even purport to consider the issue. Furthermore, the most natural reading of the language in question suggests the contrary: the panel in *Holy Spirit Ass'n* recognized, as do we, that the fact that a pledge was made is *probative* of the fact that information of the type provided could not have been obtained without guaranteeing its sources confidentiality; in the absence of any evidence in the record in *Holy Spirit Ass'n* capable of undermining the foregoing inference, the panel saw no reason to overturn the district court's decision that the documents were shielded by exemption 3. The fact that the panel did not elaborate upon its reasoning in more detail is readily explainable by the posture in which the case appeared before the court. *Holy Spirit Ass'n* was briefed and argued before issuance of the decision in *Sims I*. Consequently, neither the district court nor the parties on appeal had the benefit of our reformulated definition of an "intelligence source" when considering the applicability of exemption 3. Faced with the task of deciding an issue that, on one hand, had not been addressed by the litigants or the trial judge and, on the other hand, seemed clear-cut on the facts of the case, the panel not surprisingly was somewhat curt in its *ratio decidendi*.

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[8] Our rejection of a *per se* rule that an informant qualifies as an "intelligence source" if and only if the agency can show that he himself requested and was promised confidentiality is reinforced by our sensitivity to the agency's argument that keeping records of such pledges would be administratively burdensome.

Second, the sentence highlighted by the dissent is sandwiched between two more extensive discussions in the *Holy Spirit Ass'n* opinion emphasizing the importance of identifying the *type* of information at issue and whether the agency could obtain information of that *type* without promising secrecy to providers of it. In the preceding paragraph, the panel quotes the *Sims I* definition in full and reiterates the principle that "the appropriate focus is on 'the practical necessity of secrecy.'" 636 F.2d at 844. Clearly, the existence of "an informant-solicited promise of secrecy" does not conclusively establish "the practical *necessity* of secrecy." And in the succeeding paragraph, the panel in *Holy Spirit Ass'n* expressly grounds its ruling that four other documents were properly withheld on its judgment that "the information contained in those documents is of the type

that the Agency could not obtain without a guarantee of confidentiality." *Id.* In short, if we are bound by precedent on this issue, we are bound to reject rather than accept a rule that proof that an informant requested and was granted a promise of secrecy is determinative of his status as an intelligence source.

On remand, therefore, the District Court should undertake the two-step analysis prescribed in *Sims I*. The court should begin by defining the type or types of information provided by the various researchers. Because the nature of the subprojects varied considerably,[9] this may require delineation of several categories of data.[10] The court should then determine whether the CIA could reasonably expect to obtain information of each of those kinds without pledging its providers confidentiality.[11] In deciding the latter question, the court may rely upon evidence in the record indicating that specific researchers did or did not in fact request and receive guarantees of confidentiality; but, for the aforementioned reasons, such evidence cannot be controlling.

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[9] The projects ranged from the drafting of a manual on sleight-of-hand tricks to various experimental programs "involving the surreptitious administration of LSD to unwitting nonvolunteer subjects 'at all social levels, high and low, native American and foreign.'" *See* FINAL REPORT OF THE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. No. 755, 94th Cong., 2d Sess., Bk. I at 390 (1976); Defendant's Answers to Plaintiffs' Interrogatories of Nov. 13, 1980, at 10, *reprinted in* App. 73.

[10] In view of the fact that the MKULTRA program is now declassified, it would seem practicable and appropriate for the court on remand to request both parties to submit, on the public record, memoranda proposing alternative schemes for categorizing the information at issue in the case. Such a procedure would be consistent with the line of decisions in this circuit requiring maximum adversarial testing of claims of FOIA exemptions. *See, e.g., Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 832-33 (D.C. Cir. 1979); *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

[11] The spirit in which the court should make this determination is described in *Sims I*, 642 F.2d at 571-72.

### III.

Two other issues raised by the parties, regarding the meaning of *Sims I*, merit brief attention. First, the District court on the first remand of this case correctly concluded that the definition of "intelligence source" is satisfied only when the *sources* of information of a particular sort would be unwilling to provide it to the CIA in the absence of confidentiality. In a situation where it may be concluded that the CIA could reasonably expect to obtain certain kinds of information from persons without guaranteeing them confidentiality, but the agency, in order to avoid adverse public reaction, wishes to maintain secrecy, the "intelligence source" exemption would not apply.

Second, the agency's professed fear that it will be able to invoke exemption 3 in the future only by presenting elaborate proof of the circumspection of its sources is unfounded. Much of the information obtained by the CIA obviously could only be gathered through some kind of covert activity. There is no question that the agency in general could not reasonably expect to obtain data of that type without guaranteeing secrecy to those who provide it. Thus, the agency will be able successfully to resist a request for disclosure of the identity of a source of such information merely by informing the court of the nature of the material involved.[18] It is only in cases like the present, where a great deal of the information is not self-evidently sensitive, where the reasons why its sources would desire confidentiality are not obvious, and where the agency's desire for secrecy seems to derive principally from fear of a public outcry resulting from revelation of the details of its past conduct,[19] that the CIA will be obliged to adduce extrinsic

evidence in order to demonstrate its entitlement to the statutory exemption.

## CONCLUSION

For the foregoing reasons, the District Court's determination regarding which of the individual researchers satisfy the "need-for-confidentiality" portion of the definition of "intelligence source" promulgated in *Sims I* is reversed. All other aspects of the court's decision are affirmed. The case is remanded for expeditious reconsideration of the researchers' statuses.

*So ordered.*

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[18] *Cf. Holy Spirit Ass'n v. CIA*, 636 F.2d at 844 ("The index with respect to . . . four documents does not specifically mention confidentiality, but we are satisfied from the descriptions that the information contained in those documents is of the type that the Agency could not obtain without a guarantee of confidentiality." (footnote omitted)).

[19] The dissent takes issue with this characterization of the most plausible explanation for the agency's desire for secrecy. The dissent argues that there already has been "substantial 'public outcry' about MKULTRA," as if to suggest that the agency has little to fear from fuller revelation of the nature and purpose of its "experiments." Our prior decision in this case flatly refutes this suggestion. As noted in *Sims I*, "the CIA destroyed most of its substantive records pertaining to the project in 1973." 642 F.2d at 564. Indeed, it never has been seriously disputed that, for the most part, only "general descriptions" of the MKULTRA program are in the public domain. *Id.* The horrifying features of some of those descriptions, *see* note 9 *supra*, suggest that the agency has much to fear from the kind of fuller disclosures of its past behavior that discussions with the participating researchers might make possible.

The dissent goes on to suggest that there are "many reasons more plausible than fear of public outcry for the CIA's resistance to releasing the names of the researchers." However, the conduct of the agency before the District Court casts considerable doubt on each of the motives the dissent offers. The dissent argues that the CIA may wish (1) not to "embarrass" researchers, (2) to protect researchers from harm, or (3) to keep its promises to researchers. These possibilities are plainly belied by the fact that the agency repeatedly refused to contact the researchers to ascertain their understanding of their prior relationship with the agency or their wishes regarding further concealment of their participation in the program. *See Sims I*, 642 F.2d at 565-66; note 5 *supra*. And the agency's express renunciation of reliance on exemption 1 renders implausible the suggestion that it believes that "revelation of the identities of the researchers could aid foreign intelligence operations in discovering sensitive information."

BORK, *Circuit Judge, concurring in part and dissenting in part:* While I am in general agreement with much of the majority's position, I dissent from the holding on one point, decline to join in one statement, and express some doubt concerning the ruling of this court in *Sims v. CIA*, 642 F.2d 562 (D.C. Cir. 1980) ("*Sims I*").

1. The court holds that an informant is not an "intelligence source," even though he sought and received a promise of confidentiality, "if the agency readily and openly could have obtained, from other sources, data of the sort he provided." Majority opinion at 7. In such cases, the CIA must disclose the informant's identity in response to a request under the Freedom of Information Act. The majority recognizes that proof of an informant's demand for and receipt of a pledge of confidentiality would be evidence that the information supplied is of a sort of CIA could not reasonably expect to obtain without a promise of confidentiality. But the majority is incorrect, I believe, in holding that an informant-solicited promise of secrecy does not automatically qualify the informant as an intelligence source. This seems to me to follow both from precedent and common sense.

This court's opinion in *Holy Spirit Ass'n v. CIA*, 636 F.2d 838 (D.C. Cir. 1980), applied the *Sims I* definition of "intelligence source," *id.* at 844, and focused on the type of information obtained in explaining its conclusion that certain of the documents at issue were properly withheld because their release would disclose intelligence sources, *id.* at 844 n.12 (documents 21, 22, 23, and 39). With respect to at least three of the other documents at issue, however, *id.* at 844 n.10 (documents 12, 17, and 31), the court did not focus at all on the type of information given. The court instead stated as its complete explanation of the reason it was proper to withhold the documents that "[t]he Document Disposition Index submitted by the Agency specifically indicates that three of the ten documents are withheld because their disclosure would identify persons who gave information with the understanding that it would be kept in confidence." *Id.* at 844 (footnotes omitted). The court in no way suggested that this conclusion was merely evidentiary.

It drew no inference about the type of information from the existence of promises of confidentiality. It relied solely on the existence of those promises.

Only by straining and by supplying missing language can the *Holy Spirit* opinion be read as treating a promise of confidentiality as mere evidence. Neither does consistency with the *Sims I* definition demand that reading. The term "kind" is sufficiently general to encompass cases in which informants believe they need confidentiality before providing the information requested. The *Holy Spirit* court apparently thought that to be so, and *Holy Spirit* is as much a binding decision of this circuit as is *Sims I*. In any event, the majority's narrow reading of *Sims I* and *Holy Spirit* should be rejected not only because it is strained but also because it produces pernicious results.

A promise-of-confidentiality test for Exemption 3 seems to me necessary in order for 50 U.S.C. § 403(d)(3) (1976) to serve its function of "protecting intelligence sources and methods from unauthorized disclosure." Without it, individuals who give information to the CIA on the understanding that their names will be kept secret cannot rely on the promise of confidentiality if the information turns out to be the sort the CIA can get elsewhere without promising secrecy, something the sources of the information will often not be in a position to know. There is, moreover, no guarantee that a judge, examining the situation years later and deciding on the basis of a restricted record, will come to an accurate conclusion. Reasonable people will differ about such judgments. The CIA and those who cooperate with it need and are entitled to firm rules that can be known in advance rather than vague standards whose application to particular circumstances will always be subject to judicial second-guessing. Our national interest, which is expressed in the authority to keep intelligence sources and methods confidential, requires no less.

Many persons who expect pledges of confidentiality to be honored will be shocked to learn, long after they give information in return for such a promise, that their identities will be disclosed. Because of the ever-present possibility of a future breach of trust ordered by the judiciary under the vague standard laid down today, the CIA will probably lose many future sources of valuable intelligence. Moreover, in this very case, retrospective application of a rule interpreting section 403(d)(3) to focus exclusively on the type of information may be profoundly unjust. It will certainly be so if it results in the disclosure of the identities of the six researchers who fully, and justifiably, expected the government to keep its commitment and to protect them from the wide range of dangers that may have concerned them when they insisted on confidentiality. This is not an honorable way for the government of the United States to behave, and the dishonor is in no way lessened because it is mandated by a court of the United States.

2. My second disagreement with the majority opinion is not with any holding but with its gratuitous speculation that "the agency's desire for secrecy seems to derive principally from fear of a public outcry resulting from revelation of the details of its past conduct." Majority opinion at 12. We have no basis for that attribution of motive. For one thing, there has already been substantial "public outcry" about MKULTRA as a result of the executive and congressional investigations and reports on the program. More important, there are many reasons more plausible than fear of public outcry for the CIA's resistance to releasing the names of the researchers. Among them are a desire to live up to commitments of confidentiality the CIA made or believes it made many years ago, even if those commitments cannot be proven; desire to protect from harm and embarrassment individuals who were witting or unwitting sources for the CIA; belief that breaching past trusts will endanger its future ability to attract potential intelligence sources; and belief that revelation of the identities of the researchers could aid foreign intelligence operations in discovering sensitive information. What is perhaps oddest, however, about the majority's speculation about the CIA's motives for resisting disclosure is that the CIA may yet prevail on the merits of the case, thus vindicating its position. In any event, the CIA's litigating position is hardly frivolous, and disagreement with the CIA's assessments either of its intelligence needs or of its legal obligations is in-

sufficient reason to cast doubt on the CIA's good faith belief in those assessments. In these circumstances, it is inappropriate for the court to suggest that the CIA's position was adopted in bad faith.

3. With the exceptions just discussed, I concur in the court's opinion. I do so, however, only because we are bound by the definition of "intelligence source" given in *Sims I*. Were we free to reconsider that definition, I might adopt a different one. Since we have not had the benefit of briefing and argument on this question, I do not state flatly that a different definition should be adopted, but the matter is troublesome enough to warrant a word or two.

I will not here fully analyze the weaknesses I find in the *Sims I* definition or in the analysis supporting the definition. I will focus instead on what I regard as the central difficulty. It seems to me that "the practical necessity of secrecy," on which the *Sims I* court relied in deriving its construction of section 403(d)(3), requires that the CIA's interest in information be protected from disclosure. I know of no reason to think that section 403(d)(3) was meant to protect sources of information only if secrecy was needed in order to obtain the information. It seems far more in keeping with the broad language and purpose of that provision to conclude that it authorizes the nondisclosure of a source of information whenever disclosure might lead to discovery of what subjects were of interest to the CIA. One need not be an expert in intelligence work to know that it is often possible to deduce what a person is doing, thinking, or planning by knowing what question he is asking or what information he is gathering. That is true even when the answers and information are publicly available. The mere fact that the CIA pursues certain inquiries tells our adversaries much that there is no reason to think Congress intended them to know.

Accordingly, if presented the opportunity to reconsider *Sims I*, I would consider adopting a definition of "intelligence sources and methods"—separating the two components of the phrase artificially narrows a statute probably intended to be quite sweeping in its authorization of secrecy—that focuses not solely on the need for secrecy in gathering information but also on the need for secrecy about what information is sought. Under such a definition, public availability of information and the lack of any need to promise confidentiality to obtain it would be no ground for finding the identity of an information source subject to disclosure.

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## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1982

No. 82-1945
Civil Action No. 1 78-02251
Filed: Aug. 17, 1983

JOHN CARY SIMS, ET AL. APPELLEES

*v.*

CENTRAL INTELLIGENCE AGENCY, APPELLANT

AND CONSOLIDATED CASE NO. 82-1961

BEFORE: EDWARDS and BORK, *Circuit Judges*, and FAIRCHILD* *Senior Circuit Judge*, U.S. Court of Appeals for the Seventh Circuit

On consideration of the Petition for Rehearing of the Central Intelligence Agency, filed July 25, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

*Per Curiam*

For the Court:
GEORGE A. FISHER, *Clerk*
By: Robert A. Bonner
ROBERT A. BONNER
*Chief Deputy Clerk*

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*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

## UNITED STATES COURT OF APPEALS
## FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 82-1945
Civil Action No. 78-02251
Filed: Aug. 17, 1983

John Cary Sims, et al., appellees

*v.*

Central Intelligence Agency, appellant

And Consolidated Case No. 82-1961

BEFORE: Robinson, *Chief Judge;* Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, *Circuit Judges,* and Fairchild*, *Senior Circuit Judge,* U.S. Court of Appeals for the Seventh Circuit

### ORDER

The Suggestion for Rehearing *en banc* of the Central Intelligence Agency, filed July 25, 1983, has been circulated to the full Court. A majority of the Court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

*Per Curiam*

For the Court:
George A. Fisher, *Clerk*
By: Robert A. Bonner
Robert A. Bonner
*Chief Deputy Clerk*

Circuit Judges Wilkey, Bork and Scalia would grant the Suggestion for Rehearing *en banc.*

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*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

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## APPENDIX C

## UNITED STATES COURT OF APPEALS
## FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 82-1945
Civil Action No. 78-02251

Filed: June 10, 1983

John Cary Sims, et al.

*v.*

Central Intelligence Agency, appellant

No. 82-1961

John Cary Sims, et al., appellants

*v.*

Central Intelligence Agency,
Administrator, Stansfield Turner

Appeals from the United States District Court
for the District of Columbia

BEFORE: Edwards and Bork, *Circuit Judges,* and Fairchild,* *Senior Circuit Judge,* United States Court of Appeals for the Seventh Circuit

### JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court from which these appeals have been taken is hereby reversed in part, affirmed in part, and the case is remanded to the District Court, all in accordance with the opinion of this Court filed herein this date.

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*Sitting by designation pursuant to 28 U.S.C. § 294(d).

*Per Curiam*

For the Court
/s/ George A. Fisher
GEORGE A. FISHER
*Clerk*

*Date:* JUNE 10, 1983.
Opinion for the Court filed by Circuit Judge Edwards.
Separate statement, concurring in part and dissenting in part, filed by Circuit Judge Bork.

## APPENDIX D

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251
Filed: Dec. 22, 1981

JOHN CARY SIMS, ET AL., PLAINTIFFS,

v.

CENTRAL INTELLIGENCE AGENCY, DEFENDANT.

## MEMORANDUM

This is a Freedom of Information Act ("FOIA") suit in which the plaintiffs seek the identities of the Principal Researchers ("PRs") and of the institutions which employed them in the MKULTRA program conducted several years ago by the Central Intelligence Agency ("CIA"). This program involved research into "chemical, biological and radiological materials capable of employment in clandestine operations to control human behavior."[1] The CIA originally resisted disclosure of these names on the ground that disclosure of them would impermissibly disclose the identity of intelligence sources. *See* National Security Act of 1947, 50 U.S.C. § 403(d)(3), made applicable to FOIA by exemption 3, 5 U.S.C. § 552(b)(3). In addition, the CIA claimed that the names were personnel records, release of which would constitute a "clearly unwarranted invasion of privacy," thus exempt by exemption 6, 5 U.S.C. § 552(b)(6). This Court ruled against the CIA on both these claims, after the CIA declined an invitation to assert that disclosure of the names was exempt for national security reasons. 5 U.S.C. § 552(b)(1). *Sims* v. *Central Intelligence Agency*, 479 F. Supp. 84 (D.D.C. 1979). On appeal the Court of Appeals affirmed on exemption 6 but remanded on the issue of whether the identities of these persons and institutions were exempt under exemption 3. The Court of Appeals directed this Court to test the CIA's claim that disclosure would impermissibly disclose "intelligence sources," by applying to the facts there the following definition of such a source:

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[1] Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 94-755, 94th Cong., 2d Sess., Book I at 389 (1976).

> "a person or institution who provides information of a kind the Agency needs to perform its intelligence effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it."

*Sims* v. *Central Intelligence Agency*, 206 U.S. App. D.C. 157, 166, 642 F.2d 562, 571 (1980).

Both parties have now moved for summary judgment on this remaining issue. Plaintiffs challenge the claim of exemption here under all three parts of the Court of Appeals' definition. Some of the principal researchers, they assert, did not provide information at all, but rather materials or supplies, and are therefore not encompassed within the Court of Appeals' definition. This reading of the definition of intelligence sources is too narrow. To this Court, it is irrelevant whether a source tells the CIA how to synthesize a substance or synthesizes the substance itself and sells it to the CIA; in either case, what is essentially being provided is information, and if the other requirements of the definition are met then the source is an intelligence source.

Similarly, plaintiffs dispute whether the research done here was needed to perform the CIA's intelligence function. They point to the fact that much of the product of the MKULTRA research was never used operationally. However, the issue of whether or not this research was necessary to perform the Agency's intelligence function is just the sort of issue on which this Court must pay considerable deference to the Agency. *See Halperin* v. *CIA*, 203 U.S. App. D.C. 110, 629 F.2d 144, 148 (1980). In view of the agency's concern that potential foreign enemies could be engaged in similar research and the desire to take effective countermeasures, this Court cannot say that this research was not needed. Even some of the more innocuous subjects researched have a nexus with the MKULTRA subject sufficient to establish that the defendant could reasonably determine that this research was needed for its intelligence function.

The crucial issue thus becomes the third part of the Court of Appeals' definition: whether the information was of a kind that the Agency could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it. A necessary prerequisite to the satisfaction of this portion of the definition is that the CIA have in fact made a guarantee of the confidentiality of the source; obviously if no guarantee was given, and the information was nonetheless obtained, then, under the Court of Appeals' definition, no guarantee was necessary. Assuming that defendants proffered evidence of such a guarantee, there would be a further issue: whether this guarantee was necessary, or whether the information could have been obtained without the guarantee.

In fact, however, the CIA has almost totally failed to present evidence that such guarantees were given. Defendant relies principally on the affidavit of M. Corley Wonus, the director of the Office of Technical Service of the Directorate of Science and Technology of the CIA. His affidavit and supporting documents essentially state that it was the custom and practice of the CIA to give all of its sources a pledge of confidentiality. Therefore, he reasons, such a pledge was probably given to the researchers at issue here.

There is ample evidence to support a claim that the CIA desired confidentiality of the relationship between it and the principal researchers, but very little evidence that any of the researchers themselves desired confidentiality. Indeed, many of the researchers were completely unwitting of CIA involvement, and thus could not have been promised confidentiality. The only response which defendant can make to this fact is to argue that much of the relevant evidence has been destroyed and that some of the researchers who appear unwitting may have in fact been witting. Such a possibility is insufficient to justify withholding the information under a statute which places the burden of justifying nondisclosure on the Agency and directs *de novo* review by the Court of Claims of exemption. *Ray v. Turner*, 190 U.S. App. D.C. 290, 587 F.2d 1187 (1978).

The chief problem which the CIA faces is the fact that many of the relationships here at issue were chiefly oral, with few written records being kept. *See* Affidavit of Mr. Carley Wonus at 3. In addition, many of the documents which did exist were destroyed by the Agency in 1973. While the Court does not presume that these documents would have been adverse to the defendants, their absence at least imposes a duty on defendants to do more than ask the Court to accept on faith its assertions that all of the researchers were promised confidentiality. Indeed, the fact that the CIA has maintained that even the names of the unwitting researchers must remain undisclosed impeaches its contentions with respect to those researchers who were witting of CIA involvement.

It is clear from the evidence that defendant has presented that the chief desire for confidentiality was on the part of the CIA. For understandable reasons, the Agency wished its interest in this subject matter kept secret, and feared that disclosure would jeopardize its ability to continue its research. However, the fact that the CIA engaged in this program is now public, and the CIA has not asserted exemption 1, as it might be entitled to do if it wished to protect aspects of the program as yet undisclosed. However, the Agency has declined this route and chosen to rely on exemption 3. To do so under the Court of Appeals' definition, it must show that the researchers themselves desired confidentiality for their own purposes. It might have been possible to do this by contacting the researchers themselves and submitting *in camera* affidavits from them asserting that they then and now desired confidentiality for their own purposes. The Court suggested this step earlier with respect to exemption 6, and of course, it was also available with respect to exemption 3. *See* 479 F. Supp. at 89. The CIA has chosen not to follow this route either. Instead, it has relied upon the assertion that confidentiality was normally guaranteed. All of the evidence suggests, however, that this was solely to protect the CIA.

The only evidence of any concern on the part of the CIA with the desires of the researchers for confidentiality appears in an April 3, 1963 proposal attached to a 1963 Inspector General's Report, which is in turn attached to the Second Affidavit of M. Corley Wonus. It states: "In many cases . . . [a researcher] is unwilling to have his name on a contract which remains out of his control in our files. Experience has shown that qualified competent individuals . . . are most reluctant to enter into signed agreements of any sort which connect them with this activity since such a connection would jeopardize their professional reputations." This statement tends to show that it may have been necessary in some cases to promise confidentiality to some researchers in order to convince them to perform the requested research. The record is practically devoid of any evidence which would inform the Court as to which of the researchers this possibility applies to. For the CIA to maintain that because some researchers desired some confidentiality, the Court must infer that (1) all were promised it, and (2) that such a promise was necessary surpasses the limits of the normal deference owed to the CIA under *Halperin v. CIA*, *supra*. It would amount to a rule that the CIA is entitled to keep all relationships which it considers confidential secret. Such a rule is clearly inconsistent with the remand of the Court of Appeals. This is all the more true where the CIA has declined to produce the best evidence, the statements of the researchers themselves. Indeed, the CIA has presented no affidavits from its own personnel involved with MKULTRA, relying instead on Mr. Wonus, who had no involvement whatsoever with the project.

In addition, for many of the subprojects, even assuming that a guarantee was given, it is doubtful at best whether it was necessary. Examples include Subproject No. 104, research on the ecological relations involved in the deterioration of petroleum products; No. 92, an exploration of the usefulness of mechanization in foreign language training; No. 112, a study of current problems in vocational guidance; No. 111, a study of the measurement of motivation; No. 96, a study of the psychology of personal constructs as it applies to foreign cultures; No. 123, a study of emerging ethnic images in three countries; No. 84, a study of high motivation by development of specific interpersonal relationships; and No. 65, a study of blood groupings as a means of identifying individuals. It seems clear that such research, which goes on constantly at many places, could have been done without a guarantee of confidentiality. At least, the defendant has provided no evidence to rebut this inference.

The Court thus concludes that almost all of the identities of the researchers must be disclosed. The exceptions which the Court has found are PRs 4, 15, 20, 27, 50, and 62. For all but two of these, plaintiffs concede that disclosure is inappropriate if the researcher is still living. The Court is convinced, however, that whether the researcher is living or dead is irrelevant. A promise of confidentiality is not a life estate: many people are concerned about their reputations in a historical perspective. Their friends and families may be concerned even after the researcher is dead.

For PR 4, there is considerable evidence, chiefly in a Memorandum dated June 29, 1955, which tends to show that the researcher desired confidentiality. Though it is not totally clear that this desire was for his own purposes, the likelihood that it was is sufficient to justify the nondisclosure of his identity. For PR 62, a document dated 20 Nov. 1967 provides similar evidence. The absence of such evidence with respect to almost all other researchers stands in stark contrast. Indeed, defendant claims that the identity of PR 102 should be withheld despite the fact that the CIA on one occasion had to prevent him from revealing his association with the CIA by threatening to take legal action against him.

There is one possibility, however, which the Court must face before finally ordering disclosure. At least some of these researchers are alleged to have also been employed operationally in foreign countries. For any who have been so employed, it would be obviously inappropriate for this Court to require disclosure of their role in MKULTRA, which could possibly lead to the disclosure of their operational activity as well. Accordingly, defendant may within

twenty days from the date of this Memorandum present any evidence which it wishes to present, *in camera* if necessary, tending to show that a particular PR has engaged in foreign operational activity. Upon viewing such evidence, the Court will determine whether any further exemptions are justified. Absent such evidence, however, the Court will require disclosure of the identities of all of the PRs except Nos. 4, 15, 20, 27, 50, and 62.

Defendant has offered no justification for its failure to disclose the identities of institutions except the possibility that they might lead to the indirect disclosure of PRs. There is no evidence that any of the institutions required confidentiality for their own purposes. Accordingly, defendant will be ordered to disclose the identity of all institutions except those involved with the researchers found to be exempt.

Despite a vigorous dissent from Judge Markey, the Court of Appeals remanded this case to provide the Agency with another chance to provide evidence that these researchers were "intelligence sources" under the Court of Appeals' definition. *See* 642 F.2d at 577 (Markey, J., dissenting). Despite being given another chance, the Agency has failed to provide the support for its assertions that the Court of Appeals contemplated. It has now been four years since plaintiffs' initial request for these documents. To paraphrase Judge Markey, four years is enough. *See id.* at 575.

Accordingly, the Court will hold this case under advisement for twenty days from the date of this Memorandum to allow the defendant to submit any further evidence which it wishes to submit on the foreign operational use of any of the Principal Researchers. Upon submission of this data, the Court will enter the appropriate summary judgment order.

/s/ Louis F. Oberdorfer

Louis F. Oberdorfer
*United States District Judge*

Date: December 22, 1981

## UNITED STATES DISTRICT COURT
## FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251
*Filed: June 15, 1982*

JOHN CARY SIMS, ET AL., PLAINTIFFS,

*v.*

CENTRAL INTELLIGENCE AGENCY, DEFENDANT

## MEMORANDUM

In *Sims v. Central Intelligence Agency*, 642 F.2d. 562 (D.C. Cir. 1980), our Court of Appeals defined an "intelligence source" as that term is used in 50 U.S.C. § 403(d)(3) as follows:

> A person or institution that provides, has provided or has been engaged to provide the CIA with information of a kind of the Agency needs to perform its intelligence functon effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who obtain it.

Applying that definition to the consideration of this case on remand, this Court found and concluded that the CIA had not established that the names of eighty-five of the ninety-one Principal Researchers engaged in the MKULTRA project whose identities are at issue here* were exempt from disclosure under the Court of Appeals definition. *See Memorandum of December 22, 1981.* That memorandum invited the defendant to adduce further evidence on the record, but in camera if necessary, with respect to its representation that some of the Principal Researchers whose identities would, solely on the basis of their MKULTRA work, be disclosed had engaged in intelligence activities of an operational nature, separate and apart from their MKULTRA research. Thereafter, the

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**When the Court required the classified exhibits, the government furnished them by courier the next day. The courier waited outside Chambers to receive the documents and returned them to secure storage.

Court conferred with counsel for both parties (in Chambers but on the record) to design a procedure for *in camera* consideraton of the CIA evidence of those activities. Pursuant to that procedure, the Court has reviewed a classified affidavit by an informed CIA officer, Louis J. Dube, and documentary evidence that some of the Principal Researchers were engaged by the CIA to perform operational duties, including the collection of intelligence overseas, and that some others had served as sources for the CIA's Domestic Contact Division ("DCD"). To facilitate appreciation of the affidavit, the documents and their significance, the Court has examined and re-examined them in the presence of Mr. Dube, other CIA officers, and the Assistant United States Attorney of record in this case, with a court reporter transcribing the entire colloquy. The Court questioned and heard argument from Mr. Dube and counsel about the evidence offered and its practical and legal significance. In deference to CIA security concerns, the Court allowed the Assistant United States Attorney to retain custody of the exhibits and the transcripts under orders to furnish them to the Court forthwith upon request.** The Court also permitted the CIA to furnish the court reporter with appropriate security clearance to transcribe the proceedings in Chambers after the Court administered an oath making the reporter an officer of the Court for the purpose of these proceedings, and admonished the reporter as to the enforceable obligations imposed by that oath to furnish and maintain a completely accurate transcript.

In order to avoid language which might compromise security concerns of the CIA, the Court indicated its ruling on the classified transcript and minutes and invited the government to suggest proposed findings and conclusions which would publish rulings in language which would not compromise security.

In addition, the Court has invited and received supplemental briefs from counsel for both parties with respect to

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**When the Court required the classified exhibits, the government furnished them by courier the next day. The courier waited outside Chambers to receive the documents and returned them to secure storage.

the question of whether Principal Researchers who, in addition to work on MKULTRA, voluntarily and without compensation provided information of potential intelligence significance which might become available to them in the normal course of professional and social activities outside the United States were intelligence sources within the meaning of 50 U.S.C. § 403(d)(3). Finally, the Court has considered the question (not before the Court of Appeals when it considered *Sims*) of whether disclosure of the name of a Principal Researcher who is also a specialist in some field and is engaged by CIA to obtain information or give advice in that field would impermissibly disclose an intelligence "method."

The Court is satisfied from the evidence, the arguments and consideration of common sense that identification of a person as an MKULTRA researcher who is or was covertly engaged by the CIA as an intelligence source in some other connection could materially risk disclosure of that person's other intelligence role. Similarly, identification as an MKULTRA Principal Researcher or a person who is also a specialist whose identification with the CIA in another connection could materially risk disclosure of that person's other intelligence role. Finally, identification as an MKULTRA Principal Researcher of a specialist engaged by CIA could risk disclosure of CIA's interest in that specialty and thereby risk disclosure of intelligence methods involving that specialty. The evidence supports a finding that CIA could not reasonably expect to obtain the non-MKULTRA services of these persons without guaranteeing the confidentiality of the persons providing those services and identification of their MKULTRA roles could jeopardize those guarantees. However, after careful consideration of defendant's claim for exemption of names of unwitting Principal Researchers living in foreign countries or having relatives there, the Court concludes, for the reasons stated in the December 22, 1981 Memorandum, that exemption is not authorized by the Court of Appeals' definition.

The activities of the exempt researchers fall within the following categories:

A. Twenty (20) persons who collected foreign intelligence or counterintelligence abroad from foreign individuals while engaged in activities related to their professions, or participated in a covert action program conducted abroad which incorporated in the planning and execution the professional specialty of the Principal Researcher.

B. Nine (9) who collected foreign intelligence or counterintelligence from foreign visitors to the United States while engaged in activities in their professional fields or participated in a covert action program.

C. Nineteen (19) who were sources of the CIA's Domestic Collection Division (DCD) and who reported to the CIA on foreign intelligence matters related to their professional fields.

D. Three (3) who were well-known in their fields of endeavor and who engaged in the development of a technique or who have highly specialized knowledge whose association with the CIA would, if known, disclose to foreign intelligence services an intelligence method employed by the CIA in unacknowledged intelligence activities. Such individuals deserve protection on the grounds that while they may not be intelligence sources under the Court of Appeals' definition, disclosure of their names would or could lead to the disclosure of intelligence methods.

Many of the persons engaged by the CIA as MKULTRA researchers were not currently engaged in the additional activity disclosure of which concerned the CIA. Indeed some of the non-MKULTRA engagements were many years ago. But the law exempting intelligence sources and methods from disclosure is not restricted to contemporary sources and methods. Here common sense and the law may part company. But both the CIA and the Court are governed by law.

A May 24, 1982 submission by defendant sought, at this late date, to reopen the entire matter to enable the CIA to study whether it could discover some risk that identification of MKULTRA researchers with no other CIA connection could somehow lead to disclosure of intelligence methods because their work product was used in some other intelligence endeavor. This idea apparently only occurred to the defendant as an after thought. The issues of disclosure of MKULTRA researchers qua MKULTRA were adjudicated in the December 22, 1981 Memorandum, after more than ample opportunity for the CIA to present its case. Mindful of Judge Markey's dissent in the Court of Appeals and finding no substance in defendant's suggestion, the Court must deny that request. Nor does the apparently newly discovered fact that five of the Principal Researchers are residing in foreign countries justify reopening their non-exempt status at this late date, even assuming that their foreign status is relevant on the issue of whether or not they were promised confidentiality.

The accompanying Order will grant the defendant's motion for Summary Judgment in part and deny it in part. The identity and number of the particular names to be disclosed can be determined from the Appendix to that Order.

/s/ Louis F. Oberdorfer
LOUIS F. OBERDORFER
*United States District Judge*

Date: JUNE 11, 1982

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251
Filed: June 15, 1982

JOHN CARY SIMS, ET AL., PLAINTIFFS

*v.*

CENTRAL INTELLIGENCE AGENCY, DEFENDANT

## ORDER

This matter was remanded by the Court of Appeals for further proceedings. For reasons more fully stated in a Memorandum filed December 22, 1981, and a further Memorandum of even date, it is this 11th day of June, 1982 hereby:

ORDERED, ADJUDGED AND DECREED: That defendant's Motion for Summary Judgement is granted in part and denied in part; and it is further

ORDERED, ADJUDGED AND DECREED: That plaintiff's Motion for Summary Judgment is granted in part and denied in part; and it is further

ORDERED: That within thirty days of the date of this Order defendant shall furnish to plaintiffs the names of the Principal Researchers whose names are not identifiable in the Appendix to this Order and are not among the six individuals whose names were held to be exempt by the Memorandum of December 22, 1981, such names to include those of PRs 13, 21 and 65; and it is further

ORDERED: That within thirty days of the date of this Order defendant shall furnish to plaintiffs the names of all institutions not associated with Principal Researchers whose names are exempt under this Order.

/s/ Louis F. Oberdorfer
LOUIS F. OBERDORFER
*United States District Judge*

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2551

Filed: June 15, 1982

JOHN CARY SIMS, ET AL., PLAINTIFFS

*v.*

CENTRAL INTELLIGENCE AGENCY, DEFENDANT.

### APPENDIX TO ORDER

I—Represents the classified Affidavit of Louis J. Dube, dated January 12, 1982. Principal Researchers listed therein are assigned a letter from A to U for purposes of identification.

II—Represents the classified Affidavit of Louis J. Dube, dated March 10, 1982. Principal researchers listed therein are assigned a letter from A to T for purposes of identification.

Categories Referred to in Order:

A. I: B, C, E, G, H, I, J, L, Q, U, K
  II: F, D, J, K, L, N, O, S

B. I: A, F, M, N, S, T, O
  II: G, T

C. I: O, R
  II: A, B, C, D, E, H, I, J, K, L, M, N, O, P, Q, R, S

D. I: D, P, K

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## APPENDIX E

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 79-2203 & 79-2554

JOHN CARY SIMS ET AL.

*v.*

CENTRAL INTELLIGENCE AGENCY ET AL., APPELLANTS

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 78-2251)

Argued May 28, 1980

Decided September 29, 1980

Before WRIGHT, *Chief Judge*, MIKVA, *Circuit Judge*, and MARKEY,* *Chief Judge*, United States Court of Customs and Patent Appeals.

Opinion for the court filed by *Chief Judge* WRIGHT.

Opinion dissenting in part filed by *Chief Judge* MARKEY.

WRIGHT, *Chief Judge:* This appeal presents two issues concerning the obligations of the Central Intelligence Agency (CIA) under the Freedom of Information Act (FOIA).[1] In response to a citizen request for the names of persons and institutions who conducted scientific and behavioral research under contracts with or funded by the CIA, the Agency asserts two statutory exemptions from the disclosure requirements of the FOIA. Invoking Exemption 3,[2] the Agency claims that the requested material is "specifically exempted from disclosure" by the terms of the National Security Act.[3] The Agency also cites Exemption 6, which shields "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"[4] The District Court denied the applicability of either exemption to the facts in issue and granted summary judgment to the appellees who requested the documents.[5] In reviewing the District Court's analysis of the issue presented under Exemption 3, we are unable to conclude that the court reached its decision through application of the proper legal standard. We therefore remand the case for additional proceedings. With regard to Exemption 6, the decision of the District Court is affirmed, although, as explained below, we differ with the court's analysis of the issue presented.

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*Sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

[1] 5 U.S.C. § 552 (1976).

[2] 5 U.S.C. § 552(b)(3) (1976). Exemption 3 authorizes withholding of documents that concern matters "specifically exempted by statute" from the disclosure requirements of the FOIA. *See* text at note 30 *infra* (quoting provision in full).

## I. FACTS AND PROCEDURAL BACKGROUND

### A. *Facts*

Between 1953 and 1966 the CIA sponsored extensive research concerning "chemical, biological, and radiological materials capable of employment in clandestine operations to control human behavior."[6] Code-named MKULTRA, the CIA's research program included 149 subprojects undertaken on a contract basis. CIA records document the participation of at least 80 institutions and 185 researchers.[7] Because the CIA funded MKULTRA largely through a front organization, many of the participating individuals and institutions apparently had no knowledge of their involvement with the Agency.[8]

On the basis of available documents, it appears that the CIA originally conceived MKULTRA as a defensive response to possible use by the Soviets and the Chinese of chemical and biological agents as instruments of interrogation and brainwashing.[9] Later, however, the Agency expanded the scope of the program to include efforts to develop chemical and biological agents for use by the CIA. At least some of the subprojects tested chemical and biological substances by administering them to human subjects. Some of the subjects volunteered for their experimental role. Others were unwitting participants, who may never have known what happened to them. At least two persons died as the result of MKULTRA experiments. The extent of possible damage to the health of others remains unknown, because CIA records fail to disclose the identities of all experimental subjects.

The abuses associated with MKULTRA achieved broad publicity as a result of investigations and published reports by an executive commission chaired by Vice President Nelson Rockefeller[10] and a congressional committee led by Senator Frank Church.[11] Nonetheless, the details of the project's history remain mysterious. At the direction of then Director Richard Helms, the CIA destroyed most of its substantive records pertaining to the project in 1973. Investigative efforts therefore depended largely on oral testimony. In 1977, however, the Agency located some 8,000 pages of previously undisclosed documents related to the project.[13] Consisting mostly of fiscal and financial records, the new material had escaped the search of the archivists who conducted the earlier purge. In addition to general descriptions of 149 subprojects, the new documents contained the names of persons and institutions who had contracted to undertake research.

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[3] National Security Act of 1947, ch. 343, 61 Stat. 495 (1947) (codified in scattered sections of 5 & 50 U.S.C.). The Agency relies on § 102(d)(3) of the Act, 50 U.S.C. § 403(d) (3) (1976), which authorizes the Director of Central Intelligence to protect "intelligence sources and methods from unauthorized disclosure[.]" The CIA argues that the persons and institutions who conducted the research involved in this case are "intelligence sources" within the meaning of the statute.

[4] 5 U.S.C. § 552(b)(6) (1976).

[5] The opinion of the District Court, as amended August 13, 1979, is reported at 479 F. Supp. 84 (D.D.C. 1979).

[6] Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 94-755, 94th Cong., 2d Sess., Book I at 389 (1976) (footnote omitted) (hereinafter cited as "Church Committee Final Report").

[7] Brief for appellants at 10.

[8] Brief for appellants at 10.

[9] For an account of MKULTRA research and abuses, *see generally* Church Committee Final Report, *supra* note 6, at 385-422, 471-472, *reprinted in* Addendum to Brief for Appellant at 12-51; Joint Hearings Before the Senate Committee on Intelligence and the Subcommittee on Health and Scientific Research of the Senate Committee on Human Resources, "Project MKULTRA, The CIA's Program of Research in Behavioral Modification," 95th Cong., 1st Sess. (Aug. 3, 1977) (hereinafter cited as "Joint Hearings"); Report to the President by the Commission on CIA Activities Within the United States 226-228 (1975) (hereinafter cited as "Rockefeller Commission Report").

[10] The Rockefeller Commission Report, *supra* note 9, was completed in 1975.

[11] The Church Committee Final Report, *supra* note 6, was compiled prior to the discovery by the CIA of the documents that are the subject of the present FOIA request. Those documents were, however,

Upon discovery of the project data, CIA Director Stansfield Turner notified the Senate Select Committee on Intelligence, and he testified at a joint hearing of the Select Committee on Intelligence and the Subcommittee on Health and Scientific Research of the Senate Committee on Human Resources. The CIA subsequently provided the Joint Committee first with summary reports and then with copies of the documents themselves. Although the CIA's records listed participating researchers and institutions, Admiral Turner requested that the Committee treat the names as confidential. The Committee has honored this request.

### B. FOIA Request and Litigation

In a letter dated August 22, 1977, following the conclusion of congressional hearings, John C. Sims and Dr. Sidney M. Wolfe—respectively an attorney and a physician employed by the Nader group Public Citizen—filed a request under the Freedom of Information Act for a list of the names of institutions and researchers who had conducted research under the MKULTRA program, as revealed in any existing MKULTRA documents.[14] According

to submissions filed with the court by the CIA, the documents within the scope of the appellees' request contain a total of 265 names: the names of 80 institutions and 185 individual researchers. Upon receipt of the document request, the CIA contacted each of the 80 institutions to ask if they would consent to disclosure of their identities. The Agency made no parallel effort to communicate with the individual researchers. Of the 80 institutions, 59 agreed to disclosure. Their names were revealed to appellees on June 13, 1978. The Agency has also permitted appellees to examine the surviving financial records for the MKULTRA subprojects undertaken by the other persons and institutions, but with their names deleted. In other words, the CIA continues to withhold the names of the 21 research institutions that declined to authorize release of their identities as well as the names of all of the 185 individual researchers listed in MKULTRA files. Dissatisfied with the extent of the information provided to them, appellees brought this FOIA action on November 30, 1978.

In a memorandum opinion dated April 12, 1979[15] the District Court held that the institutions and researchers did not, as asserted by the CIA, qualify for withholding under Exemption 3 because they did not constitute "intelligence sources" within the meaning of 50 U.S.C. § 403 (d)(3). With regard to the Exemption 6 argument, the court requested that the parties submit supplemental memoranda on the relevance of possible express or implied promises by the CIA to maintain the confidentiality of the researchers whose work it had funded.[16] The court also asked the CIA to draft letters to the researchers and institutions soliciting their understandings of Agency obligations to maintain secrecy.[17] On May 14, 1979 the CIA submitted a further

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made available to the Joint Senate Committee comprised of the Senate Select Committee on Intelligence and the Subcommittee on Health and Scientific Research of the Senate Committee on Human Resources. *See Joint Hearings*, *supra* note 9.

[13] Brief for appellants at 12.

[14] Although the FOIA imposes no burden of justification, appellees Sims and Wolfe have argued that only by identifying and approaching individual researchers would it be possible to discover information of great public interest: the scope of MKULTRA experimentation, the substantive findings of the research, the side effects of various drugs, and the identities of experimental subjects. Brief for appellees at 25-28.

[15] The opinion is printed in the Appendix (App.) at 81-85.

[16] App. 84.

[17] *Id.*

memorandum, an affidavit by Admiral Turner,[17] and a draft of a form letter suitable for mailing to individual researchers. But the Agency declined to assert reliance on a contract theory as its basis for withholding, and it reargued its position that the involved institutions and researchers should be considered "intelligence sources" as a matter of law. In an opinion of August 7, 1979 Judge Oberdorfer rejected both defenses.[18] The court adhered to its prior holding that the institutions and researchers did not constitute "intelligence sources" because the Agency had not shown that "its decision to treat the MK-ULTRA institutions and researchers as 'intelligence sources' under § 403(d)(3) is not an overbroad application of the term, too susceptible to administrative discretion to pass muster under [FOIA Exemption] (b)(3)."[19] Regarding Exemption 6, the court determined that it could not accept the position of the Agency without additional information as to whether "any researcher had any reasonable expectation that his or her participation would be anonymous, as to whether any researcher has any other privacy interests which might be compromised by disclosure * * * or whether any researcher has any other objection or reason for objection to disclosure of his or her name."[20] Judge Oberdorfer again invited the CIA to communicate with the individual researchers and apprise the court of their responses by October 1, 1979. The court also gave the Agency additional time to reconsider its decision not to rely on Exemption 1 to the FOIA, which authorizes withholding of documents that are properly classified in order to protect national security interests in defense or foreign policy.[21] The CIA chose not to pursue the suggestions of the District Court. The Agency adhered to its view that its Exemption 6 claim required no communication with the individual researchers, and it filed no papers asserting that the names in issue could properly be classified to protect the national security under Exemption 1.[22] A final judgment ordering disclosure of the researchers' names was entered on November 30, 1979.[23] This appeal ensued.

## II. FREEDOM OF INFORMATION ACT

The Freedom of Information Act, under which this case arises, prescribes with unmistakable clarity the role of the courts in evaluating agency claims of exemption. The basic policy of the Act is to compel disclosure. The burden is always on the agency to support any claim of a right to withhold, 5 U.S.C. § 552(a)(3) (1976), and the courts are authorized to undertake *de novo* review of agency constructions of applicable statutes and of agency determinations that particular records fall within exemption classification. *Id.*[24]

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[17] *Reprinted in* App. at 89-97.

[18] *Sims v. CIA*, 479 F.Supp. 84 (D.D.C. 1979) (as amended Aug. 13, 1979).

[19] *Id.* at 87.

[20] *Id.* at 88.

[21] Exemption 1, 5 U.S.C. § 552(b)(1) (1976), immunizes from compulsory disclosure matters that are:

> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order[.]

Executive Order 12065, 43 Fed. Reg. 28949 (July 3, 1978), currently permits classification of information within three categories:

> 1-102. "Top Secret" shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.
>
> 1-103. "Secret" shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.
>
> 1-104. "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause identifiable damage to the national security.

*Id.* at 28950, §§ 1-102—1-104. The court's invitation to the CIA to cite Exemption 1 could scarcely have been more explicit:

> The Court also notes that the policy objectives which concern the Director might very well be accommodated by classifying the lists of names of institutions and researchers pursuant to Executive Order 12065, so that the lists would be exempt from disclosure by 5 U.S.C. § 552(b)(1). In fact, the lists were once so classified, but the defendant has since elected to declassify them so that they are not now exempt under (b)(1). Nothing in the Court's ruling that (b)(3) is inapplicable to the lists here at issue is intended to foreclose (or approve) new classification of the lists and resort to section (b)(1) in order to protect any commitment to anonymity made by defendants to any institution or researchers. The effective date of the accompanying order has been set forward to October 1, 1979 in order to permit the defendant to reexamine and act on the possibility of classifying the names of institutions and researchers which would otherwise be disclosable and to amend the motion and opposition to invoke (b)(1), if it should elect to do so.

*Sims v. CIA*, *supra* note 18, 479 *F.Supp.* at 88 (footnote omitted).

[22] Defendant's Response to Plaintiffs' Motion for Issuance of a Final Order, App. at 113, 114-115 (Nov. 27, 1979).

[23] *Reprinted in* App. at 117.

In weighing claims asserted by an agency so intimately connected with national security as the CIA, courts may feel a natural disposition to proceed with some deference. Even in this delicate context, however, Congress has indicated that the basic FOIA policy of maximum disclosure must be enforced in appropriate cases by the courts.[25]

Two amendments to the Freedom of Information Act, both adopted in response to deferential decisions by the Supreme Court, clearly signal congressional intent concerning the judicial role. The first amendment responded to *EPA v. Mink*, 410 U.S. 73, 81-84 (1973), in which the Court affirmed nondisclosure under Exemption 1, the "national security" exemption to the FOIA, solely on the basis of an agency affidavit. Exemption 1 then covered matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy,"[26] and the Court construed the provision as withholding judicial authority to test the propriety of executive classifications. Within two years Congress reversed *Mink* by legislation. As modified, Exemption 1 now requires that, in order to qualify for the exemption, information must "in fact [be]

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[24] Courts were given authority to review *de novo* any denial of access "in order that the ultimate decision as to the propriety of the agency's action is made by the court and [to] prevent [review] from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965).

[25] Congress specifically addressed this issue when it overrode President Ford's veto to pass the 1974 Amendment authorizing *de novo* review of agency classification decisions in national security cases. The legislative history of this provision, which became 5 U.S.C. § 552(b)(1), is extensively rehearsed in *Ray v. Turner*, 587 F.2d 1187, 1200-1214 (D.C. Cir. 1978) (Wright, C.J., concurring).

[26] 5 U.S.C. § 552(b)(1)(1970).

properly classified pursuant to * * * Executive order."[27] Its terms thus demand judicial determination of the relation of various documents to the national security and, accordingly, review of agency records in order for courts to determine the propriety of classification.[28]

Congress moved similarly to nullify the decision rendered by the Supreme Court in *FAA Administrator v. Robertson*, 422 U.S. 255 (1975). Exemption 3 originally applied to any "matters specifically exempted from disclosure by statute."[29] After the *Robertson* Court held that this language encompassed a statute granting broad agency discretion to determine whether information should be withheld, Congress, concerned that the Court's construction threatened the purposes of the FOIA, quickly amended the Act. Exemption 3 now authorizes nondisclosure of matters "specifically exempted from disclosure by statute" only where the exempting provision either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]"[30]

In the case at bar the CIA rests its claim of a right to withhold, as it must, on specific exemptions provided by the FOIA. The CIA is not exempt from the FOIA. Congress has determined that the requirements of national security are satisfied by the specific structure of exemptions created by statute.

Within the statutory framework the CIA is entitled to rely on any or all of the nine FOIA exemptions. In previous cases brought before this court the Agency has relied most frequently on Exemption 1, pertaining to matters classified in order to protect the national security.[31] But the CIA is not limited to that exemption, or required to invoke it in a particular case. It has chosen not to invoke it in this one.

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[27] 5 U.S.C. § 552(b)(1) (1976).

[28] 5 U.S.C. § 552(a)(4)(B) (1976).

[29] 5 U.S.C. § 552(b)(3) (1970).

[30] 5 U.S.C. § 552(b)(3) (1976).

[31] *See, e.g., Ray v. Turner, supra* note 25; *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

Denial of protection claimed for documents under one exemption does not, of course, mean that the same or similar material would not be exempt from disclosure if another exemption were invoked and its procedures properly satisfied. But the burden is always on the agency to justify nondisclosure under the terms of the specific exemption or exemptions that it claims. In this case the CIA has based its claim on two exemptions from among the nine: the Exemption 3 exception for matters specifically protected by statute and the Exemption 6 shield for personnel and similar files.

## III. EXEMPTION 3

### A. Issue Presented

This court has held consistently that Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403 (d)(3) (1976), which authorizes the Director of Central Intelligence to protect "intelligence sources and methods" from unauthorized disclosure, "establishes particular criteria for withholding or refers to particular types of matters to be withheld" and thus qualifies as a withholding statute under Exemption 3. *E.g.*, *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978), *cert. denied*, ____ U.S. ____, 48 U.S. L. Week 3602 (March 17, 1980); *Marks v. CIA*, 590 F.2d 997 (D.C. Cir. 1978). Our Section 403(d)(3) cases have mostly involved questions of the degree of factual specificity a CIA affidavit must attain in order to enable a court to determine that particular documents come within its terms. *E.g.*, *Goland v. CIA*, *supra*, 607 F.2d at 351; *Ray v. Turner*, 587 F.2d 1187, 1195-1197 (D.C. Cir. 1978). Other cases have considered the conditions under which a court should undertake *de novo* review of the accuracy of facts alleged in a CIA affidavit claiming a right to withhold under Exemption 3. *E.g.*, *Ray v. Turner*, *supra*, 587 F.2d at 1194-1195; *Weissman v. CIA*, 565 F.2d 692 (D.C. Cir. 1977). Never, however, have we undertaken expressly to construe the term "intelligence sources and methods." We have simply assumed the phrase to have a plain meaning. The question

of statutory construction presented by this case is therefore one of first impression, in which there is little precedent to guide us. We must determine, or provide guidelines for determining, whether the researchers and institutions whose names the CIA seeks to withhold constitute "intelligence sources" within the meaning of Section 403(d)(3).[illegible]

Although we have never before been asked to construe this term, our cases make clear the guidelines within which construction of exempting statutes under Exemption 3 must proceed. "The words of the statute and the relevant precedents establish the kinds of matters that are exempt and any necessary procedural steps that are required for exemption." *Ray v. Turner*, *supra*, 587 F.2d at 1214 (Wright, C.J., concurring). Moreover, we must take care that terms susceptible of expansive interpretation are construed "with sensitivity to the 'hazard[s] that Congress foresaw.'" *Founding Church of Scientology v. Nat'l Security Agency*, 610 F.2d 824, 829 (D.C. Cir. 1979) (brackets in original), *quoting American Jewish Congress v. Kreps*, 574 F.2d 624, 629 (D.C. Cir. 1978). In order to carry out "Congress' intent to close the loophole created in *Robertson*," *Founding Church of Scientology v. Nat'l Security Agency*, *supra*, 610 F.2d at 829, *quoting Ray v. Turner*, *supra*, 587 F.2d at 1220 (Wright, C.J., concurring), courts must guard against expansion of the "particular types of matters" Congress has exempted from disclosure in a way that would create broad agency discretion of the very type that Congress sought to eliminate.

Because the term "intelligence methods and sources" appears in the text of the National Security Act, it is appropriate for us to begin our analysis with the construction proposed by the CIA, an agency chartered by that statute and charged with major responsibility for its administration. *See*, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975); *Skidmore* v. *Swift*, 323 U.S. 134, 139-140 (1944). But we must not shrink from the responsibility

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[illegible] The Agency makes no claim that any of the information here in issue must be withheld in order to protect intelligence "methods."

vested in us by Congress. The question presented is one of law reserved ultimately to our determination.

### B. CIA Interpretation

On this appeal the CIA argues for a standard under which the term "intelligence source" is defined to mean "any individual, entity or medium that is engaged to provide, or in fact provides, the CIA with substantive information having a rational relation to the nation's external national security."[33] The Agency candidly concedes that this is a broad definition, which would apply even to periodicals—including *Pravda* and the *New York Times*—from which it culls information that informs its view of foreign nations and their policy intentions.[34]

The CIA supports its construction of the National Security Act primarily through an appeal to policy considerations.[35] The Agency argues that the complexity of its mission makes necessary an expansive definition broad enough to encompass those who give assistance to clandestine agents and those who develop intelligence devices and techniques on which agents rely, even if they do not themselves provide the CIA directly with information about foreign governments. Noting that information about mind-altering drugs, like all research leading to development of investigative devices and technology, is rationally related to national security and threats thereto, the Agency worries that scientists may hesitate to undertake research for the Agency in the future, or that exposure of researchers' identities might expose them to foreign surveillance or interference. The Agency also argues that its responsibilities include analysis as well as collection of secret information, and that it should not, consistent with the demands of national security, be compelled to make public the names of those persons and even those publications that it consults. Finally, the Agency insists that a standard weakening its power to withhold information in one area of its activities may cause

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[33] Brief for appellants at 24.

[34] See reply brief for appellants at 5.

[35] See generally brief for appellants at 25-28; reply brief for appellants at 5-6.

persons associated with it in other areas to lose confidence in the Agency's promises and hence to break contact with it.

### C. The Statutory Context

In assessing the arguments proffered by the CIA we must be mindful that the "unmistakable thrust" of the *Robertson* amendment to the FOIA "is to assure that basic policy decisions on governmental secrecy be made by the Legislative rather than the Executive branch," *American Jewish Congress v. Kreps, supra*, 574 F.2d at 628 & N.33; *see Founding Church of Scientology v. Nat'l Security Agency, supra*, 610 F.2d at 827-829, and that it is the responsibility of the courts under the FOIA "to insure that agencies do not impermissibly expand by unreviewed interpretations the 'particular types of matters' Congress has exempted from disclosure," *Ray v. Turner, supra*, 587 F.2d at 1221 (Wright, C.J., concurring). Taking seriously the responsibilities vested in us by the Congress, we are unable to agree with the CIA that Congress intended the term "intelligence sources" to refer so broadly. Although the legislative history is sparse, the mosaic of revelant statutory enactments reflects Congress' sensitivity to the need for discrimination in identifying particular types of matters exempted from disclosure. This sensitivity can be seen, not only in the Freedom of Information Act,[36] but also in the relationship between the National Security Act[37] and the Central Intelligence Agency Act[38]—a relationship that belies the suggestion that Congress intended the term "intelligence sources" to receive an elastic construction in order to preserve vital secrets that would otherwise lack protection.

The principal purpose of Congress in enacting the National Security Act of 1947, in which Section 403(d)(3) appears, was to unify the armed forces under a single Secretary of Defense. As part of an overall effort "to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to national security[,]"[39] the Act created the National Security Council and the Central Intelligence Agency. The statute vests in the CIA responsibility for correlating and evaluating intelligence generated, not only through its own facilities, but also through those of other government agencies. It then states, without further elucidation or definition of terms, that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure[.]"[40]

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[36] 5 U.S.C. § 552 (1976).

[37] National Security Act of 1947, ch. 343, 61 Stat. 495 (1947) (codified in scattered sections of 5 & 50 U.S.C.).

[38] Central Intelligence Agency Act of 1949, ch. 227, § 1, 63 Stat. 208 (1949) (codified at 50 U.S.C. §§ 403a-403j (1976)).

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[39] National Security Act of 1947 § 2, 50 U.S.C. § 401 (1976).

[40] National Security Act § 102(d), 50 U.S.C. § 403(d) (1976), recites the powers and duties of the CIA as follows:

> *For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Agency, under the direction of the National Security Council—*
>
> (1) to advise the National Security Council in matters concerning such intelligence activities of the Government departments and agencies as relate to national security;
>
> (2) to make recommendations to the National Security Council for the coordination of such intelligence activities of the departments and agencies of the Government as relate to the national security;
>
> (3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: *Provided*, That the Agency shall have no police, subpena, law-enforcement powers, or internal-security functions: *Provided further*, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence: *And provided further*, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;
>
> (4) to perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the National Security Council determines can be more efficiently accomplished centrally;
>
> (5) to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.

In the context, the phrase "intelligence sources and methods" is ambiguous. It would support the CIA's construction that the identity of anyone providing information rationally related to national security is *ipso facto* protected. Yet the Act's underlying purpose of safeguarding national security gives equal plausibility to the inference that persons are intended to be regarded as protected intelligence sources only if nondisclosure of their identities would itself be justifiable on national security grounds—the construction probably most compatible with the position of appellees on this appeal.

Against this background, the Central Intelligence Agency Act of 1949, and particularly Section 7 of that Act, 50 U.S.C. § 403g (1976), assumes some significance. As it appears in the United States Code, Section 403g, "in order further to implement the [protection of intelligence sources] proviso of section 403(d)(3)," recites in greater detail specific kinds of information that are statutorily exempt from disclosure: "[T]he Agency shall be exempted from the provisions * * * of any * * * law[s] which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency[.]"[41]

We believe the specificity of Section 403g is important to this case for two reasons. First, it suggests that the parade of horribles feared by the CIA if its definition is not accepted would simply not occur. Section 403g provides specific protection for most of the CIA activities and contractual relationships about which the Agency has expressed greatest concern. This conclusion is strengthened by the fact that the Agency may always—though it has not chosen to do so in this case—invoke Exemption 1 to justify nondisclosure of any material it properly decides to classify in order to protect a specific interest in national security. Second, Section 403g evinces a congressional awareness that Section 403(d)(3) as originally written is not and was not intended to be endlessly expansive. Congress recognized that Section 403(d)(3) would require construction and interpretation limiting executive discretion to withhold; otherwise it would have felt no need to "implement" the original proviso by listing the specific matters exempted from disclosure under Section 403g.

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[41] 50 U.S.C. § 403g (1976).

As a result of congressional action the meaning of "intelligence sources" in Section 403(d)(3) unambiguously encompasses all classes of persons and entities within the listing of Section 403g. In order to preserve, yet also to limit, the range of matters additionally protected, we must look, in the absence of clear legislative history, to the congressionally mandated and valid purposes of the Central Intelligence Agency, whose effective functioning Congress sought in Section 403(d)(3) to promote.

In chartering the CIA Congress set out, not to protect secrecy as an end in itself, but to provide for effective collection and analysis of foreign intelligence pertinent to concerns of national security. Secrecy seems to have been a concern only insofar as it was pertinent to protection of the national security. Analysis should therefore focus on the practical necessity of secrecy. In order to avoid an overbroad discretionary standard, *see Founding Church of Scientology v. Nat'l Security Agency, supra*, 610 F.2d at 829, yet at the same time to protect the underlying concerns of Congress, Section 403(d)(3) must be interpreted in functional terms: an "intelligence source" is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

### D. Issues on Remand

Application of this standard will entail a number of complex determinations for which this case must be remanded to the District Court. Conceptually distinct, yet implicating similar if not identical factual concerns, these include definition of the class or "kind" of information involved and assessment of the likelihood that disclosure would undermine CIA access to information of that kind.

The inquiries requisite to these determinations will be heavily factual, and, as an opinion by Judge Wilkey recently emphasized, courts should accord "substantial weight" to the factual allegations of the CIA in the area of national security. *Halperin v. CIA*, ___ F.2d ___, ___ (D.C. Cir. No. 79-1849, decided July 11, 1980) (slip opinion at 7). Congress intended no less, but also no more.

In amending the Freedom of Information Act to reverse the *Mink* case and to provide for *de novo* review in the District Courts of agency decisions to classify information under the national security exemption, Congress carefully considered the weight to which agency determinations were entitled. One proposal called for agency classifications in the national security context to be subject only to minimal judicial scrutiny: courts would be limited to determining whether there was a "reasonable basis" for the agency decision to withhold a document.[illegible] Congress explicitly rejected this position.[illegible] *De novo* review was provided in every case.

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[illegible] The bill reported by the Senate Judiciary Committee would have prescribed this standard. S. 2543, 93d Cong., 2d Sess. § (b)(2), reported in Staffs of Senate Committee on the Judiciary and House Committee on Government Operations, Freedom of Information Act and Amendments of 1974 (Pub. L. 93-502), Source Book: Legislative History, Texts, and Other Documents, at 282 (Committee Print 1975) (hereinafter cited as "Source Book").

[illegible] The "reasonable basis" language was deleted from the Senate bill pursuant to an amendment introduced by Senator Muskie. *See* 120 Cong. Rec. 17022-17032 (1974). Senator Ervin supported the Amendment with the following remarks:

> The [unamended] bill provides that a court cannot reverse an agency even though it finds it was wrong in classifying the document as being one affecting national security, unless it further finds that the agency was not only wrong, but also unreasonably wrong.
>
> * * * * *
>
> Why not let the judge determine that question, because national security is information that affects national defense and our dealings with foreign countries? That is all it amounts to.
>
> If a judge does not have enough sense to make that kind of judgment, he ought not to be a judge * * *.

*Id.* at 17030.

Congressional intent emerges clearly from the report of the Conference Committee to which the "substantial weight" standard can be traced.[64] The report recognized that "the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public exposure of a particular classified record." Accordingly, it was "expect[ed] that Federal courts, in making de novo determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record."[65] But the Conference Committee reiterated its intention to authorize de novo judicial decisions. And it specified that "[t]he burden remains on the Government under this law."[66]

As the *Halperin* case illustrates, the "substantial weight" formula is most likely to assist the Government in meeting its burden when answering questions about the future effects of document disclosure on national security. As the court stated, a predictive statement "will always be speculative to some extent[.]" *Halperin v. CIA*, *supra* ____ F.2d at ____, slip opinion at 10. In holding the Government to the burden of justification imposed on it by Congress, courts should not require the impossible. On the other hand, there are other inquiries in which the CIA must stand on essentially the same footing as any other litigant. For example, final resolution of FOIA cases typically demands an application of law to fact. Once the facts are found, it may remain to be determined whether they fall within the exempting ambit of one or another statute. Construction of statutes is an area of special judicial competence. Agency interpretations should not, in this context,

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[64] S. Rep. No. 93-1200, 93d Cong., 2d Sess. 9 (1974). The Conference Committee explicitly rejected a proposal by President Ford to return to the "reasonable basis" standard of review. *See* letter from president Gerald R. Ford to Honorable William S. Moorhead, August 20, 1974, reprinted in Source Book, *supra* note 62, at 380.

[65] S. Rep. No. 93-1200, *supra* note 64, at 12.

[66] *Id.* at 9.

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receive any more "substantial weight" than their intrinsic merit commands.

The *Halperin* case is again illustrative. One section of the court's opinion settled the narrow point of law that private attorneys who work under contract for the CIA in matters pertaining to necessarily clandestine activities constitute "personnel employed by the Agency" whose names are exempt from disclosure under Exemption 3 and Section 403g. *See id.*, ____ F.2d at ____, slip opinion at 13-15. Before reaching this narrow legal conclusion that court, in other parts of its opinion, accorded substantial weight to the Agency's assertion that disclosure of the names of such attorneys would lead to exposure of intelligence sources. *Id.*, ____ F.2d at ____ ____, slip opinion at 6-11. But the court indicated no reliance on the Agency in determining the legal issue. It would be inappropriate for a court to abdicate any part of its responsibility to decide whether a factual showing of the likely consequences of disclosure should suffice to bring a particular document within the protective intent of a pertinent statute.

## IV. EXEMPTION 6

Exemption 6 to the Freedom of Information Act authorizes withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"[67] In order for an agency to justify nondisclosure under this provision, the Government must carry each of three burdens. First, the agency must establish that the requested file is in fact appropriately classified as "personnel," "medical," or "similar." Second, it must demonstrate that release of the information would violate substantial privacy interests of the person or persons involved. Finally, but only if the first two burdens are met, the statute prescribes a balancing test on which the agency must also prevail. In order to resist disclosure, the agency must show that the substantial interest in personal privacy is not outweighed by the public interest in disclosure. *Dept's of Air Force* v. *Rose*, 425 U.S. 352, 373 (1976); *Getman* v. *NLRB*, 450 F.2d 670, 674-677 (D.C. Cir. 1971).

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[67] 5 U.S.C. § 552(b)(6) (1976). The CIA invokes Exemption 6 to protect the names of individual researchers, but makes no claim that the names of the institutions participating in MKULTRA could be withheld on that basis. Exemption 6 is applicable only to individuals. *Nat'l Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976); *Robertson v. Dep't of Defense*, 402 F. Supp. 1342, 1349 (D. D.C. 1975).

Although finding that a list of names of individual researchers comprised "similar files" under Exemption 6, the District Court rejected the Government's claimed right to withhold by determining that the CIA had failed to satisfy the third requirement of nondisclosure.[48] The court noted that the Agency had not supplied information the court deemed essential to accurate assessment of the privacy interests involved.[49] And without such information the Government could not prevail on the balancing test.

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[48] Any ambiguity in the court's opinion arises because the second and third inquiries are so intimately connected. Although the court's conclusion that the public interest in disclosure outweighs the privacy interest in nondisclosure clearly assumes some weighing of the relevant privacy interest, it is unclear whether the District Court in this case decided the second issue—whether there was an invasion of personal privacy sufficiently deep and severe to qualify under any circumstances as "clearly unwarranted." The court might merely have assumed the existence of such an interest *arguendo* and then found that interest to be overridden. *See Sims v. CIA*, *supra* note 18, 479 F. Supp. at 89.

[49] Although the District Court held that the CIA had not provided adequate factual support for its claim to invoke Exemption 6, it invited the CIA to communicate with individual researchers to elicit "additional information as to whether any researcher has any reasonable expectation that his or her participation would be anonymous, as to whether any researcher has any other privacy interests which might be compromised by disclosure of participation in the project or whether any researcher has any other objection or reason for objection to disclosure of his or her name." *Id.* Believing it possible that the CIA might somehow justify its Exemption 6 claim on the basis of facts developed from the suggested communications, the District Court deferred the effective date of its order to disclose for nearly two months to give the CIA time to elicit more facts and develop legal arguments based thereon. The CIA, however, chose not to communicate with the researchers. It merely repeated the legal theories urged earlier.

After the District Court rendered its decision in this case Judge Robinson's opinion for this court in *Board of Trade of City of Chicago* v. *Commodity Futures Trading Comm'n*, ___ F.2d ___, ___-___ (D.C. Cir. No. 78-1089, decided May 13, 1980) (slip opinion at 6-16), has analyzed and clarified the features that a document must possess to meet the threshold, definitional requirements of a "similar" file under Exemption 6. Had Judge Oberdorfer had the benefit of this opinion, he might well have concluded, as we do, that the CIA records requested in this case cannot be considered "personnel and medical files [or] similar files" eligible for withholding.

Exemption 6 was intended by Congress to protect individuals from public disclosure of "intimate details of their lives, whether the disclosure be of personnel files, medical files, or other similar files." *Board of Trade of City of Chicago v. Commodity Futures Trading Comm'n*, *supra*, ___ F.2d at ___, slip opinion at 13, *quoting Rural Housing Alliance v. U.S. Dep't of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974); *see Robles* v. *EPA*, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in *Rural Housing* stated that the exemption "is phrased broadly to protect individuals from a wide range of embarrassing disclosures," 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, reputation, and so on" falls within the ambit of Exemption 6. *Id.* By contrast, as Judge Robinson stated in the *Chicago Board of Trade* case, ___ F.2d at ___, slip opinion at 14, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption.

In *Getman* v. *NLRB*, *supra*, for example, we ordered disclosure of a list of names and addresses of persons eligible to vote in union representation elections, despite assertions that their privacy would be compromised.[80] Although holding explicitly only that release would not constitute a clearly unwarranted invasion of privacy, we strongly suggested that the requested lists of names and addresses failed to qualify as "similar files.," [T]he real thrust of Exemption (6)," we wrote, "is to guard against unnecessary disclosure of files of such agencies as the Veterans Administration or the Welfare Department or Selective Service or Bureau of Prisons * * *. The giving of names and addresses is a very much lower degree of disclosure[.]" 450 F.2d at 675.

*Board of Trade of City of Chicago* v. *Commodity Futures Trading Comm'n*, *supra*, provides more direct authority. That case arose from an investigation by the Commodity Futures Trading Commission of the Board of Trade's contract to operate a commodity futures market in Chicago.[81] As part of its inquiry into the plywood futures contract the Commission solicited criticisms and suggestions from persons trading under the contract, at least some of whom responded with the understanding that their identities would be kept confidential. The Commission therefore asked the Board to respond to complaints and

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[80] In *Getman* we held that the law professors conducting an NLRB voting study were entitled to compel the NLRB to provide them with the names and addresses of employees eligible to vote in certain union elections. Because the avowed purpose of the professors was to telephone selected employees and ask them to submit to interviews, the court recognized that "disclosure does involve some invasion of privacy[.]" *Getman v. NLRB*, 450 F.2d 670, 675 (D.C. Cir. 1971). But we stressed that disclosure of the business connection between union and employee bared no intimately personal facts and left "any disclosure of information [that is] more personal * * * wholly consensual and within the control of the employee." *Id.*

[81] The Commodity Futures Trading Commission is an idependent regulatory agency created by the Commodity Futures Trading Act of 1974. Commodity Exchange Act, 42 STAT. 998 (1922), as amended by the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 STAT. 1389, 7 U.S.C. § 1 *et seq.* (1976). To function lawfully as a futures contract market, a Board of Trade must meet certain standards as well as comply with Commission guidelines. The Commission periodically conducts investigations to determine whether all requirements are being satisfied.

suggestions that it identified only as issuing from "trade sources." Arguing that it could not assess the criticisms and suggestions without knowing their sources, the Board refused to respond until the names in question were released. The Commission still declined to reveal the names of its informants, and an FOIA action ensued. In an opinion by Judge Robinson this court concluded that Exemption 6 did not apply to the challenged records, due to their essentially business nature. There was present in the case a privacy interest, implicated "insofar as release of identifying details would expose the occupations of these sources, their relationship to the Board, and how they perceive the workings of the market enterprise from which they derive at least part of their livelihood." ___ F.2d at ___, slip opinion at 15. "But," the court continued, "the fact remains that the withheld information associates these individuals with business of the Board, and not with any aspect of their personal lives. The interest in nondisclosure thus asserted is not in continued privacy of personal matters, but in anonymity * * * on purely commercial matters." *Id.*

We adhere to the analysis of Exemption 6 developed in the *Chicago Board of Trade* case. Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships. Surely it was not intended to shield matters of such clear public concern as the names of those entering into contracts with the federal government.

To support its claim to invoke Exemption 6 the CIA relies principally on *Dep't of Air Force* v. *Rose*, *supra*, a case in which the Supreme Court ordered release of files summarizing disciplinary procedings against cadets at the Air Force Academy but approved deletion of individual names therein. In holding that records of disciplinary proceedings triggered the "similar files" provision of Exemption 6, the Court noted, among other factors, the possibility of "lifelong embarrassment" ensuing from disclosure. The CIA argues that the possibility of embarrassment to CIA researchers brings the records requested in the present case within the holding of *Rose*. We cannot agree.

Although the threat of embarassment was a significant factor in *Rose*, *see* 425 U.S. at 376-377, the Court was also at pains to note that the records of the panels at the Air Force Academy involved judgments about matters that are intimate and personal in the highest degree—judgments of ethical propriety and individual honor. There was no implication that "embarrassment" alone would have sufficied to justify nondisclosure. Clearly Exemption 6 could not be invoked, under *Rose*, to protect the concerns of a contractor who would be embarrassed by disclosure of his responsibility for shoddy work. No more should it reach the names of those embarrassed by the nature of contract work they have undertaken.[58]

Moreover, even if we were to reach the stage of weighing the privacy interest in nondisclosure and ultimately that of balancing,[59] we would be compelled to agree with the District Court that the CIA has failed to justify nondisclosure. Eschewing suggestions by the District Court that it communicate with the individual researchers, the Agency has failed to particularize their objections to disclosure or to establish the likely consequences of disclosure in individual cases. In the absence of a more detailed and conclusive factual showing, we would hardly find that the Agency had shown an invasion of personal privacy so deep and severe as to count as "clearly unwarranted" when measured against the countervailing public interest in full disclosure. And in applying a statute whose language "instructs the court to tilt the balance in favor of disclosure," *Getman v. NLRB*, *supra*, 450 F.2d at 674, we have to accord substantial weight to the claims of possible public profit. These include possible increases in public knowledge of specific experimental projects and possible identification of additional victims of drug testing.

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[58] The fact that an embarrassing disclosure might have costly business consequences was implicitly held to be irrelevant in *Board of Trade of City of Chicago v. Commodity Futures Trading Comm'n*, ___ F.2d ___, ___ (D.C. Cir. No. 78-1080, decided May 13, 1980) (slip op. at 15-16).

[59] *See* text following note 47 *supra*.

### V. CONCLUSION

For the reasons stated herein, the judgment of the District Court must be vacated and the case remanded for further action not inconsistent with this opinion.

*Vacated and remanded.*

MARKEY, *Chief Judge, dissenting in part:* I join Chief Judge Wright's typically lucid opinion for the court, dissenting, with utmost respect, only from the conclusion that a remand in respect of Exemption 3 is either necessary or advisable.

Three years is enough. Plaintiffs filed their request in August, 1977. After more than a year of delay, they filed suit in November, 1978. After a year of litigation, they prevailed in 1979. It is now September, 1980. The information sought is at least 14 years old. Absent some imperative, plaintiffs should not be forced to return for further litigation in the district court.

I agree that courts, while shirking none of their statutory responsibilities under FOIA, should approach with sheathed swords when our nation's security is involved. The CIA is not the EPA or the FAA. Here, however, the Agency has specifically declined to *refuse* disclosure on national security grounds.

Indeed, the Agency has declined and disdained the deference-in-depth shown it by the district court. It has elected to confront the courts with a broad interpretation of Exemption 3, declining the district court's grant of additional time to consider Exemption 1, to assert a contract theory, to contact the researchers, and to show facts indicating that its interpretation of "intelligence sources" as here applied is not so overbroad as to amount to untrammeled agency discretion. Before us, the Agency presents policy questions more properly presented to the Congress. The resulting impression is one of *noblesse oblige*. It does the Agency no injustice to remark that one who appears to have thrown down a gauntlet should not be surprised when it appears to have been picked up. The Agency's implicit invitation to supply a usable definition of "intelligence source," as that phrase is employed in Section 403(d)(3), has been well met in Chief Judge Wright's opinion.

The clarity and applicability of that definition to the facts of record, coupled with the conduct of the Agency, prompt my view that remand is unnecessary and inadvisable.

It is true that neither the Agency in 1977, nor the district court in 1978, had the present definition available.

Nonetheless, the differences between the definition here established and that employed by the Agency are not, in light of the record, such as to compel remand.

The present definition is broader in some senses and narrower in others.[1] It is broader in substituting "provides, has provided, or has been engaged to provide" for the Agency's "is engaged to provide, or in fact provides." It is narrower in eliminating "medium," and in supplanting the broad terms "substantive information" and "having a rational relation to the nation's external national security" with a more usable "information of a kind the Agency needs to perform its intelligence function effectively." It is narrower also in adding the eminently appropriate requirement that the information be of a kind the CIA "could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it."

The Agency's definition effectively reads "intelligence source" as "information source," requiring protection of all sources of all information "rationally related" to national security.[2] As the majority opinion makes clear, that sucks into secrecy's maw too many sources of too many kinds of information. That the Agency's definition is unacceptable, however, is not alone sufficient basis for remand here.

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[1] For convenience, the definitions are juxtaposed:

Present definition:

> "[A]n 'intelligence source' is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it."

The Agency's definition:

> "An 'intelligence source' generally is any individual, entity or medium that is engaged to provide, or in fact provides, the CIA with substantive information having a rational relation to the nation's external national security."

[2] We deal here only with Exemption 3, not with Exemption 1. Considerations of national security may go beyond inquiries on whether a potential adversary may already have certain information, and may encompass inquiries on whether the adversary knows the Agency knows, whether the adversary may learn the Agency is interested in knowing, and, of course, whether the adversary may learn of the Agency's source or sources of that certain information.

Application of the standard, that is, the majority definition, does not in my view require determinations "conceptually distinct" from those made by, or foreclosed by the Agency to, the district court. Further, I find the implicated factual concerns identical.

Presumably, remand is thought necessary to allow the Agency to show that the 21 institutions and 185 researchers provided "information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it." But, as the record shows, the Agency has already established the "kind" of information here involved (research data on behavior modifying drugs). It has established its claimed need for the information, that is, to counter use of such drugs by potential adversaries and to develop its own capacity for their use. Whatever may be said of the wisdom or morality of the MKULTRA program and its operation, the Agency's need for the research data "to perform its intelligence function effectively" has not been challenged on this record. Hence, a remand is unnecessary to prove that element of the standard.

That leaves only the question of whether the information was of a kind the Agency "could not resonably expect to obtain without guaranteeing the confidentiality of those who provide it." Yet proof of the answer to that question is precisely what the Agency has adamantly refused to seek or present, though the district court twice invited it to do so. The Agency effectively refused the district court's request for evidence of express or implied confidentiality promises by the Agency. It declined the district court's suggestion that it ask the researchers, in connection with Exemption 6, whether they even expected confidentiality. A remand to enable a party to do what it had specifically refused to do when initially before the district court, thereby allowing that party to force the conduct of piecemeal litigation, is in my view entirely inappropriate.

Further, what there is in the record on the subject indicates that the Agency had good reason for not attempting to prove the information unobtainable without a guarantee of confidentiality. From all that appears, the information *was* obtained without that guarantee, express or implied. The Agency dealt primarily through a front organization. If the Agency had promised confidentiality, explicitly or implicitly, it could have so established in the court below. That it did not, even in response to the court's invitation, should be taken as evidence that it could not and cannot do so on remand.[3]

Though the "substantial weight" standard was initially phrased in relation to classified records and those here are declassified, it is not necessary to base a present refusal to remand on that ground. That the court in *Halperin* gave substantial weight to the Agency's assertion respecting the effect of disclosure of the names of attorneys under contract for the CIA might have relevance if we were considering a "factual showing" of the effect of disclosure here.[4] The district court and this court have here been denied that showing, though the Agency has had more than ample opportunity to make it and to rely on a "substantial weight" standard. If, as the majority correctly says, it would be "inappropriate for a court to abdicate any part of its responsibility to decide" when presented with such a factual showing, even in the face of a substantial weight standard, it would appear even more inappropriate for an appellate court to remand when the district court was specifically and unequivocally denied that showing.[5]

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[3] Similarly, reclassification of the names, reliance on Exemption 1, or similar post-appeal actions in avoidance of disclosure by the Agency, would create an impression of playing fast and loose with the judicial process. With three years to consider reclassification, and more than two years to consider reliance before the courts on Exemption 1, the Agency may be presumed to have no sound basis for those actions. A contrary view would make the Agency appear to have engaged in judicial gamesmanship, holding back some defenses while it tries out others through an appeal, a practice not required to obtain a judicial pronouncement on the defenses asserted. The courts' treatment here of two defenses could have easily included a third.

[4] The Agency has not here asserted that the institutions or researchers were working under a contract with the Agency or were otherwise "employees" under 50 U.S.C. § 403g (1976).

Hence I cannot join the conclusion that the district court applied an improper legal standard to the Exemption 3 defense. That defense rested on the Agency's definition of "intelligence sources." The district court, viewing that definition as overbroad (a proper legal standard), held the defense inadequate. We do the same, on the same ground. That we also "provide guidelines" will be helpful to the Agency, to others, and to the interests of judicial economy in future cases. Where, however, as here, the Agency cannot meet those guidelines, indeed, declined to even try meeting them when the district court (in different words) invited that effort, I would not remand. I would affirm the district court's judgment respecting Exemption 3.

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[5] It is true that courts should not require the impossible, and that predictions of what others might do if the names here sought were disclosed are necessarily speculative, but the time for those considerations is in my view past. Moreover, nothing of record remotely hints that the Agency will be able to do any more than repeat the bald assertions already made, namely, that disclosure of these names will impede willingness of others to work with the Agency. Whether the public today perceives the Agency as a pariah is not established on the record, but the disclosure of the names of institutions and researchers who were under the impression that they were not working for the Agency cannot be assumed to impede a willingness of others to work for the Agency when asked to do so. Presumably, also, those employing the FOIA to obtain the names here sought do not intend to risk continued viability of the statute by unnecessarily exposing those institutions and researchers to public ridicule solely on the ground that they were caught up without their knowledge in MKULTRA.

## APPENDIX F

### UNITED STATES DISTRICT COURT
### FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251

Filed: April 12, 1979

JOHN CARY SIMS AND SIDNEY M. WOLFE, M.D.,
PLAINTIFFS

*v.*

CENTRAL INTELLIGENCE AGENCY, DEFENDANT

### MEMORANDUM

#### I. Introduction

During the 1960s, the CIA provided funding to scores of universities and private foundations who engaged in certain controversial drug research. CIA records relating to these so-called "MK-ULTRA" projects have been the target of several Freedom of Information Act (FOIA) requests, and more than 8,000 pages of materials have been released by the CIA.

Plaintiffs have requested disclosure of (1) the names of the universities and other institutions that received funding from the CIA for MK-ULTRA research, as well as the name of the principal researchers at each institution; and (2) the grant proposals and contracts awarded under the MK-ULTRA program. Defendant has released approximately two-thirds of the institutions' names,[1] but it refuses to disclose the remainder, claiming that they are exempt "intelligence sources" under 5 U.S.C. § 552(b)(3) and 50 U.S.C. § 403(d)(3). The CIA also refuses to disclose the names of researchers. It claims that release of their names would constitute an unwarranted invasion of their privacy in contravention of 5 U.S.C. § 552(b)(6). Finally, defendant contends that the grant proposals and MK-ULTRA contracts already have been disclosed under FOIA. The information has been made available to plaintiffs at the CIA reading room.

The parties have filed cross-motions for summary judgment. Plaintiffs complain that the CIA's withholding of the names of the institutions and researchers is not warranted by FOIA exemptions, and that the CIA's restrictive FOIA "reading room" availability has been tantamount to an illegal withholding of requested documents. Defendant counters by alleging that its claimed exemptions are entirely appropriate, and that the court has no authority to regulate the hours of its FOIA reading room.

#### II. INSTITUTIONS' NAMES

Defendant argues that those institutions that remain unnamed participants in the MK-ULTRA program are "intelligence sources" exempt from disclosure. *See* 5 U.S.C. § 552(b)(3); 50 U.S.C. § 403(d)(3). It defines intelligence sources as persons or organizations "from which foreign intelligence, counterintelligence, or counterterrorism intelligence, is being, has been, or may be derived." *See* Answers to Plaintiffs' Interrogatories at 4 (Feb. 26, 1979). The CIA stresses the need for maintaining the confidentiality of these sources. It notes that the academic community often provides the Agency with invaluable assistance in developing foreign intelligence, and that the community thus serves as an "intelligence source." Defendant emphasizes that if the confidentiality component of this relationship is disturbed through FOIA disclosures, the Agency's intelligence capabilities will be undermined severely.

The court recognizes that, in some cases, universities and other research institutions might be "intelligence sources" within the meaning of 50 U.S.C. § 403(d)(3). For purposes of the case before the court, however, the CIA cannot claim that the unnamed research institutions are intelligence sources. The names of the institutions are being withheld not because of the nature of the research carried on under MK-ULTRA, but because the CIA wishes to uphold the pledge of confidentiality that it allegedly has extended to the institutions. The CIA's willingness to disclose the names of those institutions which did not object demonstrates that the CIA primarily is concerned with maintaining its pledge of confidentiality rather than shielding an "intelligence source."

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[1] The CIA released only the names of the institutions that did not object to the release.

Although the court is unwilling to find that the unnamed institutions are exempt "intelligence sources" for the purpose of the MK-ULTRA projects, the court does recognize the crucial importance of the CIA's continuing ability to honor its promises of confidentiality and the causal connection between its ability to honor its legitimate commitments and its ability to develop and obtain intelligence sources in the academic community and elsewhere. Thus, the CIA's course of dealing with the institutions may have given rise to an implied contract that the universities whose names are at issue here would carry on their work only if the Agency maintained the confidentiality of the research grants. *Cf. United States* v. *Snepp*, 47 L.W. 2617 (4th Cir. Mar. 20, 1979). Implied contracts based on the conduct of the parties generally are enforceable, *see, e.g., Bloomgarden* v. *Coyer*, 479 F.2d 201, 208 (D.C. Cir. 1973), and may be entitled to constitutional protection.[9] The unnamed universities may be able to assert a contractual right that their identities not be publicized by the CIA in this connection, and the existence of such contractual right may require or permit the CIA to withhold information otherwise not exempt under the later-enacted Freedom of Information Act. On the other hand, FOIA's public policy may supersede pre-existing contracts by the CIA not to publicize the names of institutions and individuals just as such contracts may be unenforceable to interdict disclosure to Congress, courts or law enforcement authorities in appropriate circumstances. *See, e.g., United States* v. *Nixon*, 418 U.S. 683, 707-713 (1974) (executive privilege of confidentiality must yield to defendants' need for relevant evidence in a criminal proceeding); 5 U.S.C. § 552(c) (FOIA does not permit the withholding of information from Congress).

The court requests the parties to submit supplemental memoranda to explore resolution of this controversy in a contract context. The court also requests defendant to prepare a sample letter, for submission to the court, which the CIA could send to each unnamed institution to ascertain whether it is, in fact, relying on a CIA commitment of anonymity in requesting nondisclosure of its name, and whether that institution still wishes to remain anonymous. Finally, the court requests the parties to consider the possible applicability of the (b)(6) exemption to the names of the instititutions in question.

### II. RESEARCHERS' NAMES

Defendants claim that the names of the principal researchers of the MK-ULTRA projects also are exempt as intelligence sources, and under 5 U.S.C. § 552(b)(6), FOIA's privacy exemption.

As with the universities themselves, it appears that the researchers for the MK-ULTRA projects are not intelligence sources. The disclosure of most of the universities' names, and of much of the information about the projects, demonstates that the CIA does not consider the researchers as "intelligence sources" for purposes of MK-ULTRA. The Agency is, however, interested in maintaining the confidentiality of its relationship with the researchers, and it also expresses a concern that disclosure of the researchers' names might subject the individuals to an unwarranted invasion of personal privacy in contravention of FOIA's (b)(6) exemption.

Here again the court recognizes the importance that the CIA honor a pledge of confidentiality to researchers. The pledge, if any, may rise to an implied contract or, alternatively, the researchers may be able to claim the benefit of implied confidentiality contracts between the CIA and the institutions on a third party beneficiary theory.

The court requests that the parties submit supplemental memoranda to explore the appropriateness of such a conclusion.[9] The court also requests defendant to prepare a sample letter, for submission to the court, which the CIA or the grantee institution could use to ask each unnamed researcher whether he or she was aware of CIA sponsorship of the research in question, and whether he or she requests nondisclosure of his or her name because of reliance on a CIA or institution commitment of anonymity.

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[9] The Due Process Clause of the Fifth Amendment protects the right of contract. *See, e.g., Highland* v. *Russell Car Co.*, 279 U.S. 253, 261 (1929). The impairment of contracts clause, U.S. Const. Art. I § 10, may also be applicable to the federal government by operation of the Due Process Clause of the Fifth Amendment.

### III. CIA "READING ROOM"

Plaintiffs complain that restrictive reading room hours resulted in a de facto withholding of documents. Defendant responds that the reading room was opened to plaintiffs gratuitiously, and that plaintiffs could have obtained the documents in question by paying photocopying costs.

The court is unwilling directly to prescribe the CIA's reading room policies, especially in this case in which it appears that the CIA is not required to provide free inspection of requested documents. *Compare* 5 U.S.C. §§ 552(a)(1)-(2) *with* 5 U.S.C. § 552 (a)(3). However, the court is concerned that the Agency may not be satisfying the § 552(b)(3) requirement that published rules describe the availability of requested documents. Instead the Agency appears to have an *ad hoc* inspection policy. Accordingly, the court will order defendant to identify its rules and regulations relating to its "reading room," if any, and if there are none now, to develop, publish and abide by appropriate rules and regulations governing "reading room" use.

An appropriate Order accompanies this Memorandum.

/s/ Louis F. Oberdorfer

Louis F. Oberdorfer
*Judge*

*Date: April 12, 1979*

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[9] The court does not mean to imply by its actions that it is not seriously considering the applicability of the (b)(6) exemption to the researchers' names. It nonetheless asks for this additional briefing to ensure that it has all relevant information before it to assist in making a final determination.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251

Filed: April 12, 1979

John Cary Sims and Sidney M. Wolfe, M.D., plaintiffs

*v.*

Central Intelligence Agency, defendant

### ORDER

In accordance with the Memorandum filed herewith, it is this 12th day of April, 1979, hereby

ORDERED: That the parties shall submit to the court, on or before April 30, 1979, supplemental memoranda (and, in the case of defendant, a sample letter) that addresses the appropriateness of implying a confidentiality contract between the CIA and the unnamed MK-ULTRA institutions; that addresses the enforceability of such a contract, if any, in view of the later-enactment of the Freedom of Information Ct; and that addresses the possible applicability of the (b)(6) exemption to the name of the institutions; and it is

FURTHER ORDERED: That the parties shall submit to the court, on or before April 30, 1979, supplemental memoranda (and, in the case of defendant, a sample letter) that addresses the appropriateness of implying a confidentiality contract between the CIA (or the institutions) and the principal researchers on the MK-ULTRA projects; that addresses the possible applicability of a third party beneficiary theory to confidential implied contracts between the CIA and the institutions; that addresses the enforceability of such contracts, if any, in view of the later enactment of the Freedom of Information Act; and it is

FURTHER ORDERED: That defendant identify for the court, on or before April 30, 1979, any applicable rules and regulations relating to its "reading room," and its plans for future rules and regulations, if any; and it is

FURTHER ORDERED: That the CIA submit to the court, or or before April 30, 1979, an affidavit describing the alleged importance of the confidentiality of the CIA's arrangements with universities and other research institutions to the national security. The affiant should be a CIA official who is charged with making judgments concerning matters that rise to the level of national security; and it is

FURTHER ORDERED: That defendant shall submit to the court, on or before April 30, 1979, any pertinent information relating to present Congressional efforts respecting revision of the CIA charter, especially as the information relates to the definition of a CIA intelligence source."

/s/ Louis F. Oberdorfer

LOUIS F. OBERDORFER
*Judge*

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## APPENDIX G

## UNITED STATES DISTRICT COURT
## FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251

Filed: Aug. 7, 1979

JOHN CARY SIMS AND SIDNEY M. WOLFE, M.D.,
PLAINTIFFS

*v.*

CENTRAL INTELLIGENCE AGENCY, DEFENDANT

## MEMORANDUM

### I.

Plaintiffs are pressing a Freedom of Information Act ("FOIA") request for disclosure of (1) the names of universities and other institutions that received funding from the defendant for the so-called MK-ULTRA program, as well as the names of the principal researchers at each institution; and (2) the grant proposals and contracts awarded under the MK-ULTRA program.[1] That program involved behavioral modification research, primarily with human subjects. Through such research, the CIA hoped to better understand "brainwashing" techniques purportedly used by foreign governments. The CIA also sponsored the research in the hope that it might discover means of obtaining information from foreign agents. *See generally* Affidavit of CIA Director Stansfield Turner (May 13, 1979) (copy attached as appendix to this Memorandum).

Defendant voluntarily has responded to plaintiffs' FOIA request by releasing approximately two-thirds of the names of the institutions that were involved.[5] It is reluctant to disclose the names of the remainder of the cooperating institutions, claiming that they are "intelligence sources" within the meaning of 50 U.S.C. § 403(d)(3) and therefore exempt from disclosure by 5 U.S.C. § 552(b)(3). The defendant also declines to disclose the names of researchers, urging that they also are exempt "intelligence sources." Defendant finally claims that release of the individual names would invade the privacy of the individual researchers in contravention of 5 U.S.C. § 552(b)(6). Plaintiffs counter by alleging that the CIA's withholding of the names of the institutions and researchers is not warranted by FOIA exemptions. The parties have filed cross-motions for summary judgment that support their divergent views.

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[1] The grant proposals and contracts have been disclosed by the CIA pursuant to previous FOIA requests. Plaintiffs had complained that restrictive CIA "reading room" hours had denied them access to the documents. The Court disposed of that claim by Order of April 12, 1979.

On April 12, 1979, this Court requested the parties to submit supplemental briefs addressing, *inter alia*, the question whether a CIA promise of confidentiality to institutions and/or researchers participating in the MK-ULTRA program might create a contractual right of non-disclosure. The Court further requested the CIA to prepare a draft of a form letter to be sent to each institution and to each researcher whose name remained undisclosed, inquiring whether the addressee relied on any CIA commitment of anonymity in agreeing to participate in the MK-ULTRA program and whether the addressee still wished to remain anonymous.

In an accompanying Memorandum, the Court ruled that defendant had failed to establish that either the institutions or the individual researchers were "intelligence sources" as that term is used in 50 U.S.C. § 552(b)(3). The Court hypothesized that the institutions and researchers might nevertheless have a common law or constitutional right to protection of their anonymity and that enforcement of such a right might have a side-effect beneficial to the public interest: protection of CIA anonymity commitments to persons with whom it established intelligence-related relationships.

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[5] The CIA released only the names of the institutions that did not object to the release. The names released include Cornell University, the University of Michigan, Stanford University School of Medicine, Princeton University, Harvard University and the Massachusetts Institute of Technology.

The parties responded to these suggestions by briefs and, in the case of the defendant, with an extensive affidavit by CIA Director Stansfield Turner. Neither brief embraces the theory that there is any contract or constitutional right of the institutions or researchers that would bar disclosure of their names, if disclosure were required by FOIA. Indeed, defendant made no showing that the researchers and institutions in this case were given promises of confidentiality. *See* note 6, *infra*. Instead, defendant's brief and Director Turner's affidavit renew the contention that the institutions and individual researchers participating in the project are intelligence sources and that the Director is required by the National Security Act to protect them from disclosure. *See* 50 U.S.C. § 403(d)(3).

## II.

Our Court of Appeals ruled, prior to 1976, that 5 U.S.C. § 403(d)(3), authorizing the Director to "protect . . . intelligence sources and methods," is "precisely the type of statute comprehended by [FOIA's] exemption (b)(3)." *Weissman* v. *CIA*, 565 F.2d 692, 694 (D.C. Cir. 1977). In 1976, however, Congress amended (b)(3) to narrow the class of statutes that qualify under the (b)(3) exemption. Congress was concerned that the Supreme Court's interpretation of the exemption in *FAA Administrator* v. *Robertson*, 422 U.S. 855 (1975), permitted agencies too much discretion in deciding the information that was subject to FOIA disclosure. Accordingly, Congress amended (b)(3) to permit the withholding of information that was exempted under certain statutes, but only if the protecting statute:

> (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

The (b)(3) amendment, as explained in *Ray* v. *Turner*, 587 F.2d 1191, 1219 (D.C. Cir. 1978) (Wright, C.J., concurring), "removed the *Robertson* loophole by insuring that no agency could rely on an 'exempting' statute unless the statute contained clear guidelines upon which a court could rely in reviewing the agency's refusal to disclose requested information."

Despite the 1976 stiffening of (b)(3), our Court of Appeals recently has ruled that the amendment was not intended by Congress "to upset the well-established exemption 3 status" of 50 U.S.C. § 403(d)(3). *Goland* v. *CIA*, No. 76-0166 (D.C. Cir. May 23, 1978), slip op. at 18. In that case the Court of Appeals affirmed the withholding of certain classified portions of a 1948 statement by the then CIA Director. The Court emphasized that the passages in question were described in a "non-conclusory and detailed affidavit" that described, among other things, "'intelligence collection and operational devices . . . still utilized and . . . basic concepts of intelligence methodology' of which 'the essential elements remain viable.'"

Despite *Goland's* identification of 50 U.S.C. § 403(d)(3) as a statute that qualifies for incorporation under the strict rules of FOIA's newly amended (b)(3) exemption, our Court of Appeals has warned on other occasions that § 403(d)(3)'s qualification under (b)(3) is not automatic. In *Ray* v. *Turner*, *supra*, for example, Chief Judge Wright noted that even though § 403(d)(3) falls under the (b)(3) exemption because it "refers to particular types of matters to be withheld,"[3] § 403(d)(3)'s language regarding protection of "intelligence sources and methods" is "potentially quite expansive." *Id.* at 1220. He concluded that in order to fulfill Congress' intent to close the *Robertson* loophole, "courts must be particularly careful when scrutinizing claims of exemptions based on such expansive terms." *Id.*

Chief Judge Wright's concerns with the potential expansiveness of § 403(d)(3) recently were echoed by our Court of Appeals in a related context. In *The Founding Church of Scientology* v. *National Security Agency*, No. 77-1975 (D.C. Cir. May 15, 1979), the Court evaluated the National Security Agency's claim that Section 6 of Public Law No.

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[3] *See* 5 U.S.C. § 552(b)(3)(B).

86-36[4] authorizes the withholding of certain documents under (b)(3). That statute permits the Agency to withhold, *inter alia*, "information with respect to the *activities* [of the National Security Agency]." (emphasis added). The Court found that the provision generally satisfies the strictures of (b)(3) because it "refers to particular types of matters to be withheld." *See* 5 U.S.C. § 552(b)(3)(B). The Court declined, however, to withhold the information in question until defendant filed detailed affidavits describing the documents in question. The Court requested supplemental affidavits in order to be certain that the information sought to be withheld concerns only those "activities" of the NSA that obviously qualify for nondisclosure under Section 6 and (b)(3). It warned that Section 6 had a "potential for unduly broad construction" that might run at cross purposes with FOIA's "overwhelming emphasis on disclosure." Slip op. at 10. As the Court noted: "a term so elastic as 'activities' should be construed with sensitivity to the 'hazard[s] that Congress foresaw.'" Slip op. at 11.

Applying the learning of *Goland*, *Ray*, and *The Church of Scientology* to the case here, the Court first reaffirms that § 403(d)(3) generally qualifies for incorporation under the (b)(3) exemption because it "refers to particular types of matters to be withheld," *viz.* "intelligence sources and methods." The Court also finds, however, that in the peculiar circumstances of this case, § 403(d)(3) does not "refer to particular types of matters to be withheld" with sufficient precision to qualify for FOIA's (b)(3)(B) exemption. Defendant has failed to demonstrate to the Court either by detailed affidavits or by clear guidelines that its decision to treat the MK-ULTRA institutions and researchers as "intelligence sources" under § 403(d)(3) is not an overbroad application of the term, too susceptible to administrative discretion to pass muster under (b)(3). Accordingly, the Court denies defendant's motion for summary judgment, in favor of plaintiffs on this issue.

Three reasons compel this result. First, unlike the courts in *Goland* and *Scientology*, this Court cannot look to detailed agency affidavits that describe MK-ULTRA activities and thereby assure itself that the MK-ULTRA projects involved intelligence-related work and that the institutions and researchers can be recognized as "intelligence sources." The MK-ULTRA records were destroyed by the CIA in 1973 and therefore are apparently not susceptible to detailed description.

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[4] 73 Stat. 64 (1959); 50 U.S.C. § 402 note (1976).

Second, because details were not available either to the incumbent Director or to the Court, both have been required to rely on generalized observations to determine whether the term "intelligence sources" may be applied to institutions or researchers in the present case. It is apparent from the face of the Director's affidavit that his definition of the institutions and researchers as intelligence sources is not well tied to particular facts and is "potentially quite expansive." *See Ray* v. *Turner*, *supra*, at 1220. Nor does the affidavit offer "clear guidelines" from which the Court can conclude that his decision to treat the institutions and researchers as "intelligence sources" is not discretionary or overbroad. Instead, the Director has characterized an intelligence source as any "contributor . . . to the intelligence process." This definition is suceptible to discretionary application and overbroad interpretation.[5]

Third, the question whether the MK-ULTRA institutions and researchers are "intelligence sources" qualifying for a (b)(3) exemption is a case at the margin. The Court would not hestitate to apply the (b)(3) exemption to most of the sources of information identified by the Director's affidavit as "intelligence sources," *e.g.*, CIA operatives, couriers who transport secret materials, etc. The present situation, however, involves behavioral research that was carried on, for the most part, at American universities, with the wit-

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[5] For a more complete definition of intelligence sources, the affidavit refers to Executive Order 12036, issued by President Carter on January 24, 1978, and to a definition approved by the Special Coordination Committee of the National Security Council and by the President, and provided to the Senate Select Committee on Intelligence for inclusion in Senate Bill 2525 of the 95th Congress. These other definitions offered by the Director in his affidavit are equally susceptible to discretionary application and overbroad interpretation.

ting or unwitting participation of American students, for a purpose which may be collateral to the main business of intelligence, and to an uncertian result. In a context such as this, the Court cannot validate the Director's determination that the institutions and researchers involved were "intelligence sources" without a strong and detailed showing of the work done under the auspices of MK-ULTRA or, if that does not make it obvious that intelligence sources are involved, by the identification of clear, non-discretionary guidelines to test whether an intelligence source is involved in a particular case. The Director has failed to meet this burden.

In reaching this decision, the Court has given careful consideration to the Director's expressed concern that disclosure of the names might impair his ability to carry out his statutory duty of protecting the defendant's intelligence sources. Performance of this duty requires him to be able to strictly honor commitments of anonymity made to such sources by and on behalf of the defendant. In fact, it was in recognition of these concerns that the Court suggested earlier that the institutions and researchers participating in the project in reliance on such commitments might have a contract right to anonymity.[6]

The Court also notes that the policy objectives which concern the Director might very well be accommodated by classifying the lists of names of institutions and researchers pursuant to Executive Order 12065, so that the lists would be exempt from disclosure by 5 U.S.C. § 552(b)(1).[7] In fact, the lists were once so classified, but the defendant has since elected to declassify them so that they are not now exempt under (b)(1). Nothing in the Court's ruling that (b)(3) is inapplicable to the lists here at issue is intended to foreclose (or approve) new classification of the lists and resort to section (b)(1) in order to protect any commitment to anonymity made by defendants to any institution or researchers. The effective date of the accompanying order has been set forward to October 1, 1979 in order to permit the defendant to reexamine and act on the possibility of classifying the names of institutions and researchers which would otherwise be disclosable and to amend the motion and opposition to invoke (b)(1), if it should elect to do so.

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[6] The Director's affidavit conspicuously does not represent that the institutions or researchers in this case received expressed or implied commitments of anonymity. *Cf.* Affidavit of Stansfield Turner ¶ 10 (May 13, 1979).

[7] 5 U.S.C. § 552(b)(1) states that FOIA disclosure requirements do not apply to matters that are: "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (b) are in fact properly classified pursuant to such Executive Order." Executive Order 12065 describes classification standards of sensitive materials. *See, e.g.*, Kanter *v.* Department of State, No. 78-0077 (D.D.C. July 25, 1979).

## III.

Defendant also urges the Court to withhold the names of the individual researchers involved in the MK-ULTRA projects on the ground that the names are exempt from disclosure under 5 U.S.C. § 552(b)(6). That FOIA provision authorizes the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Application of the (b)(6) exemption requires the Court to determine whether "personnel and medical files and similar files" are involved, and then to balance the privacy interest against the public interest in disclosure of the materials. *See generally Department of Air Force* v. *Rose*, 425 U.S. 352 (1976). Applying these standards here, the names of the MK-ULTRA researchers may be exempt from FOIA disclosure.

First, the CIA records in question have many characteristics of "personnel and medical files and similar files." They are financial in nature, detailing MK-ULTRA funding. They identify both the institutions receiving money under the project, and the principal researchers. The files thus contain "personal data"—the names of principal researchers. The inclusion of the names of the researchers in the context of CIA-funded research may implicate personal privacy concerns resembling those at stake in the specific personal data maintained by the Department of Health, Education and Welfare. *See id.* at 375. Such a claim would be particularly strong in cases where researchers participated

in reliance on actual or implied commitments that they could do so anonymously. This files thus have functional characteristics in common with and therefore are "similar" to classic personnel or medical files.

Second, disclosure of the names of the researchers may constitute a "clearly unwarranted invasion of privacy." The public interest served by further exposing the MK-ULTRA project and the possible role of universities and colleges must be weighed against concern that publicity about individual researchers' associations with the projects may seriously affect their careers and other personal relationships, causing both embarrassment and possible harassment. *See generally Wine Hobby, U.S.A. Inc.* v. *IRS*, 502 F.2d 133, 135-37 (3d Cir. 1974); *Rural Housing Alliance* v. *Dept. of Agriculture*, 498 F.2d 73, 76-77 (D.C. Cir. 1974). This risk of embarrassment is aggravated in the case of any researchers who were unwitting participants in CIA research.

Evaluation of the applicability of the (b)(6) exemption to the researchers requires additional information as to whether any researcher had any reasonable expectation that his or her participation would be anonymous, as to whether any researcher has any other privacy interests which might be compromised by disclosure of participation in the project or whether any researcher has any other objection or reason for objection to disclosure of his or her name. To this end, the Court is affording the defendant additional time in which to communicate with former researchers about the foregoing, using the form of letter suggested to the Court, or any other process which the defendant believes will elicit the information needed for resolution of this issue.

If the defendant elects to pursue the (b)(6) exemption, it will be required by the accompanying order to submit, on or before October 1, 1979, *in camera*, a list of the names of the researchers with whom defendant has communicated and an indication as to whether the person named objects to disclosure and the reason, if any, for this objection. At the same time, defendant shall file a public affidavit that itemizes the reasons given by each researcher for any objections they have to disclosure of their names. The public affidavit shall not include the researchers' names.

An appropriate Order accompanies this Memorandum.

/s/ Louis F. Oberdorfer

LOUIS F. OBERDORFER
*United States District Judge*

Date: August 3, 1979

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251

Filed: Aug. 7, 1979

JOHN CARY SIMS AND SIDNEY M. WOLFE, M.D.,
PLAINTIFFS,

*v.*

CENTRAL INTELLIGENCE AGENCY, DEFENDANT.

## ORDER

In accordance with the Memorandum filed herewith, it is this 3d day of August, 1979, hereby

ORDERED: That defendant shall disclose to plaintiffs the names of all institutions that participated in the so-called MK-ULTRA project under the auspices of the defendant; and it is

FURTHER ORDERED: That defendant's duty to disclose the names of the institutions shall be deferred until October 1, 1979 in order to permit defendant to attempt to classify the names, if appropriate, and to appeal this Order, if defendant so elects; and it is

FURTHER ORDERED: That defendant may communicate to the principal researchers involved in the MK-ULTRA project to determine whether any researcher had any reasonable expectation that his or her participation would be anonymous, as to whether any researcher has any privacy interests which might be compromised by disclosure of participation in the project or whether any researcher has any other objection or reason for objection to disclosure of his or her name. Defendant may submit, on or before October 1, 1979, *in camera*, a list of the names of the researchers with whom defendant has communicated and an indication as to whether the person named objects to disclosure and the reason, if any, for this objection. At the same time, defendant may file a public affidavit that itemizes the reasons given by each researcher for any objections they have to disclosure of their names. The public affidavit need not include the researchers' names.

/s/ Louis F. Oberdorfer

LOUIS F. OBERDORFER
*United States District Judge*

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## UNITED STATES DISTRICT COURT
## FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251

Filed: Aug. 13, 1979

JOHN CARY SIMS AND SIDNEY M. WOLFE, M.D.,
PLAINTIFFS,

*v.*

CENTRAL INTELLIGENCE AGENCY, DEFENDANT.

### SUPPLEMENTAL MEMORANDUM

The second full paragraph on page 10 of the Memorandum dated August 3, 1979 and filed August 7, 1979 is amended to read as follows:

> If the defendant elects to pursue the (b)(6) exemption, it should submit, on or before October 1, 1979, *in camera*, a list of the names of the researchers with whom defendant has communicated and an indication with respect to each researcher as to what objection, if any, the researcher may have to disclosure of his or her name, and the reason. Any affidavit filed, *in camera*, shall be accompanied by an affidavit to be filed publicly containing the same information, except for the researchers' names. If the defendant elects not to file these affidavits or otherwise move, on or before October 1, 1979, it will be deemed to have abandoned its (b)(6) exemption claim.

/s/ Louis F. Oberdorfer

LOUIS F. OBERDORFER
*United States District Judge*

Date: AUGUST 13, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251
Filed: May 14, 1979

JOHN C. SIMS AND SIDNEY M. WOLFE, M.D., PLAINTIFFS,

v.

CENTRAL INTELLIGENCE AGENCY AND
ADMIRAL STANSFIELD TURNER, DEFENDANTS.

## AFFIDAVIT

STANSFIELD TURNER does depose and say as follows:

1. I am the Director of Central Intelligence. I have served in that office since 9 March 1977.

2. As Director of Central Intelligence, I am the executive head of the Central Intelligence Agency (CIA). The CIA was established by the National Security Act of 1947, 50 U.S.C. 403, *et seq.*, as was the position of Director of Central Intelligence. Section 102(d)(3) of the Act, 50 U.S.C. 403(d)(3), provides in part: "That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods for unauthorized disclosure."

3. I have read the Complaint in this action, and I am generally familiar with this litigation. Specifically, I have read the Court's Memorandum and Order in this case, dated 12 April 1979, and note that the Court has stated in its Memorandum that it finds that the institutions and individual researchers who participated in Project MKULTRA "are not intelligence sources." Given the dictionary definition of "source" and given the generally perceived meaning of that word, I can, of course, understand the basis for the Court's belief. The purpose of this affidavit is, therefore, to familiarize the Court with some of the techniques employed and problems encountered by the CIA in the performance of its statutory duties as the central agency within the United States Government with the primary responsibility for conducting intelligence activities for the United States. It is my judgment that the institutes and individual researchers who participated in Project MKULTRA are intelligence sources and that, therefore, it is my responsibility under the National Security Act to protect them from disclosure to the extent that I determine that such protection is in the interest of national security and is necessary to enable the CIA to perform its statutory functions effectively.

4. The term "intelligence sources" is a phrase of art, encompassing a variety of entities. By that I do not mean that it is so vague or imprecise as to shroud whatever the CIA may wish to conceal. But certainly, it includes more than simply those individuals directly involved in collecting and reporting foreign intelligence information. To accomplish its intelligence collection responsibilities, the CIA must engage in a variety of related activities. Executive Order 12036, issued by President Carter on January 24, 1978, sets forth the duties and responsibilities of the CIA. It provides in part:

> 1-8. *The Central Intelligence Agency.* All duties and responsibilities of the CIA shall be related to the intelligence functions set out below. As authorized by the National Security Act of 1947, as amended, the CIA Act of 1949, as amended, and other laws, regulations and directives, the CIA under the direction of the NSC, shall:
>
> 1-801. Collect foreign intelligence, including information not otherwise obtainable, and develop, conduct or provide support for technical and other programs which collect national foreign intelligence. . .
>
> * * *
>
> 1-804. Conduct counterintelligence activities outside the United States and coordinate counterintelligence activities conducted outside the United States by other agencies within the Intelligence Community;
>
> * * *
>
> 1-806. Produce and disseminate counterintelligence studies and reports;
>
> * * *

> 1-810. Carry out or contract for research, development and procurement of technical systems and devices relating to authorized functions.

5. To further illustrate, the classic figure of the secret agent reporting from abroad on the intentions of a hostile foreign power is easily understood even by those unversed in the craft of modern intelligence. But there are other less obvious, but equally important, contributors to the intelligence process who are considered intelligence sources. There is the safehouse keeper who must provide a safe haven and secure meeting place. There is the courier whose function is to securely transport material even though the contents may be unknown to him. An access agent's function is to provide entree to another individual who in turn may be recruited or used unwittingly as an intelligence source. A cut-out is an individual who serves as a facade, concealing the fact that the ultimate recipient of information is American intelligence. Rather than collecting information, a source may be used as a channel for disseminating misinformation, to confuse and mislead a hostile foreign government. So too, the individual who conceived the idea of a particular high altitude photographic platform utilizing previously untried technology and who offered his idea to the CIA was an intelligence source. Had his association with the CIA or the Agency's interest in his concept been revealed in an untimely fashion, the intelligence units which resulted from the development of the U-2 reconnaissance aircraft might never have been realized.

6. This iteration of examples of intelligence sources could be continued, but it is not without limits. The problem in formulating a definition of intelligence sources is to insure that it is neither overly broad nor excessively restrictive. I can assure the Court that the CIA is not seeking a definition so broad as to include the local electric power company, the supplier of pencils and the public transportation company, as plaintiffs have suggested. Charter legislation concerning U.S. intelligence agencies is currently pending in the Congress. In November 1978, the Special Coordination Committee of the National Security Council and the President approved and provided to the Senate Select Committee on Intelligence the following definition as part of proposed intelligence charter legislation to be incorporated in Senate Bill S. 2525 of the 95th Congress:

> The term 'intelligence source' means a person, organization, foreign government, material or technical or other means from which foreign intelligence, counterintelligence or counterterrorism intelligence is being, has been or may be derived.

It should be noted that this definition does not represent any attempt to expand the responsibility of the Director of Central Inelligence to protect intelligence sources and methods as set forth in the National Security Act of 1947, *supra*. Rather, the intent is to capture, yet clarify and amplify, that responsibility as it has been traditionally understood within the intelligence community.

7. It is unnecessary to recount at length the details of the origin, duration and demise of the Project known as MKULTRA. Its purpose and history have been publicly discussed with significant candor. Briefly, the Project was concerned with learning the state of the art of behavioral modification at a time when the U.S. Government was concerned about inexplicable behavior of persons behind the "iron curtain" and American prisoners of war who had been subjected to so-called "brainwashing." The purpose was to support research directed at discovering whether certain substances might be capable of influencing human behavior. Institutions involved in the research were reputable and prominent in their particular fields of interest. Many of the researchers were highly respected, even eminent scientists. Initially, the thrust of the Project was defensive. In the case of some few subprojects, however, this defensive counterintelligence orientation became secondary as the possibilities for the use of such techniques to obtain information from enemy agents became apparent. However, insofar as we have been able to determine from available documentation and inquiries directed toward identifying experimental subjects, the institutions and researchers whose identities are at issue in this lawsuit were not involved in that phase of the Project. Throughout the course of the Project, CIA involvement or association with the re-

search was concealed in order to avoid stimulating the interest of hostile countries in the same research areas.

8. It should be recognized that the Project originated in response to a perceived threat to national security. Information was developed for possible exploitation for intelligence or counterintelligence purposes. Extensive measures were taken to insure that CIA interest in the institutions and researchers involved was concealed. Substantive knowledge derived from the Project and the identities of the participating institutions and researchers were considered classified as matters of national security.

9. In 1973 records believed at the time to comprise all the MKULTRA files were destroyed. During the summer of 1977 some previously undiscovered financial documents pertaining to the Project were located. Upon careful review of these records, it was determined that most of the substantive information concerning the results of MKULTRA research, to the extent that such information was contained in these records, did not require continued protection and could be declassified and released. This decision, however, did not by any means affect my continuing responsibility to protect as intelligence sources those institutions or individuals who participated, wittingly or unwittingly, in the MKULTRA research. Such disclosure of previously classified information, while continuing to protect the identities of intelligence sources, is not without precedent. In fact, it is a frequent practice. For instance, during the Cuban missile crisis, President Kennedy decided to release a great deal of sensitive intelligence information concerning Soviet missile installations in Cuba. It was clear, at that time, that the Soviets had to be told publicly that the United States Government had precise information on the extent of the Soviet threat in order to justify the strong countermeasures then taken by our Government. Nevertheless, the identities of intelligence sources who contributed to our intelligence efforts continued to be protected from disclosure. Similiarly, the technical details of the U-2s which contributed to our knowledge at that time were not revealed.

10. If the Government were a party to a contract in which confidentiality were a condition, expressed or implied, the Government could not cavalierly disregard the conditions of the contract. Of greater concern, however, is the pledge of confidentiality which pervades the relationship between the CIA and its intelligence sources. This pledge, expressed or implied, rises above the nature of a contract. It transcends any single Agency-source relationship and is inherently a matter of national security. The ability and willingness of the CIA to protect the identity of intelligence sources is the linchpin that enables the Agency to collect human source intelligence. Project MKULTRA and the sources involved in that Project do not exist in a vacuum. They cannot neatly be set aside and said to bear no relationship to the other ongoing intelligence collection efforts in which the Agency is involved now, or in which it may be involved in the future. Indeed, the willingness to protect old confidences is viewed as a positive indication of the attitude toward continuing acceptance of the responsibility to protect current and future sources.

11. The individuals, organizations and governments with which the Agency must deal are legitimately concerned with and acutely attuned to any signal that the director of Central Intelligence is unable or unwilling to discharge the responsibility to protect intelligence sources from unauthorized disclosure. Even unwitting sources must be protected not just because disclosure will probably result in the loss of intelligence available from that source, but because any disclosure is perceived by tentatively cooperative sources as an erosion or abnegation of the Director's responsibility. Source protection is an absolute. The concept that it is discretionary, that the Director of Central Intelligence will waive his responsibility as he sees fit, cannot be allowed to flourish. Too many events over the past several years have planted seeds of doubt around the world about the Agency's ability to maintain a confidence. External assaults upon the CIA by those who would deliberately destroy the Agency's effectiveness can be understood by individuals who might be persuaded to cooperate with American intelligence. It can also be understood that in unusual situations, as in the case of MKULTRA, institutions might be revealed as formerly cooperative sources where

there is mutual agreement that authorized disclosure be made.[1] But a unilateral breach of confidentiality and trust by the United States Government will be viewed as an arrogant disregard for the lives or safety or reputations of those who have contributed to our intelligence activities. In the alternative, such a breach will be seen as a sign of weakness, of inability to honor commitments. Either way, the result will assuredly be the same. The ability to recruit human intelligence sources will be impaired, if not destroyed. The willingness of those individuals who can contribute positively to the development of enhanced collection techniques, human or technical, will be diminished. The simple facts of any one situation cannot be viewed in a single dimension. In full perspective, what must be appreciated is that the perception of the CIA by active or potential sources is a determinative factor which must always be taken into account.

12. I have attempted in this affidavit to demonstrate why the researchers and the institutions which were involved in the MKULTRA research were intelligence sources. If this is accepted, then certain conclusions must inexorably follow. These conclusions are not altered by the release of the names of certain of the institutions nor by the declassification and release of substantive information concerning the Project. Those releases reflected a decision by the CIA that the public interest would be served by public disclosure, but that decision was predicated upon a condition precedent that the consent of the institutions would be first obtained. But those releses do not bear upon the continuing responsibility to protect the identities of the remaining sources. Neither the nature of the Project nor the curiosity of the public can override the obligation of the Director of Central Intelligence to abide by the Congressional mandate to protect intelligence sources which arises from the very nature of the craft of intelligence.

---

[1] I solicited such agreements from institutions involved in MKULTRA only because I am firmly committed to a course of action which may lead to the identification of any unwitting experimental subjects.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of May 1979.

/s/ Stansfield Turner
STANSFIELD TURNER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil action No. 78-2251

Filed: Aug. 31, 1979

JOHN CARY SIMS, AND SIDNEY M. WOLF, M.D., PLAINTIFFS

*v.*

CENTRAL INTELLIGENCE AGENCY, DEFENDANT.

## MEMORANDUM

Counsel for the parties should submit, on or before September 17, 1979, a memorandum as to the effect, if any, of the decision of the United States Court of Appeals in *Iron and Sears* v. *Dunn*, Civ. No. 78-1200 (D.C. Cir. July 19, 1979), with respect to the August 7, 1979 ruling in this case on section 552(b)(3), 5 U.S.C. § 552(b)(3) (1976).

/s/ Stansfield Turner
STANSFIELD TURNER

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251

Filed: Sep. 27, 1979

JOHN CARY SIMS, AND SIDNEY M. WOLFE, M.D.,
PLAINTIFFS

*v.*

CENTRAL INTELLIGENCE AGENCY AND ADM. STANSFIELD
TURNER, DEFENDANTS.

## ORDER

The Court has before it the response of the parties with respect to *Irons and Sears* v. *Dunn*, Civil No. 78-1200 (D.C. Cir., July 19, 1979), defendants' motion to vacate, and plaintiffs' motions to compel and to modify. The Court is not persuaded that *Irons and Sears* v. *Dunn* requires modification or vacation of the memorandum and order of August 7, 1979. Accordingly, it is this 27th day of September, 1979, hereby

ORDERED: That defendants motion to vacate is DENIED and it is

FURTHER ORDERED: That, treating defendants' answer as a motion to dismiss the complaint as against Admiral Stansfield Turner, that motion is GRANTED; and it is

FURTHER ORDERED: That the order of April 12, 1979 is modified so tht the third paragraph thereof, as modified, shall read as follows:

> "that defendant identify for the Court, on or before April 30, 1979, any applicable rules and regulations relating to its "reading room," and its plans for future rules and regulations, if any, and, in any event, shall on or before November 30, 1979, publish and thereafter abide by appropriate rules and regulations governing "reading room" use.

5 U.S.C. § 552(b)(3).

/s/ Louis F. Oberdorfer
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251

Filed: Oct. 2, 1979

JOHN CARY SIMS AND SIDNEY M. WOLFE, M.D.,
PLAINTIFFS,

*v.*

CENTRAL INTELLIGENCE AGENCY, DEFENDANT.

## ORDER

UPON CONSIDERATION of defendant's motion for a stay, the memorandum of points and authorities in support thereof, of counsel for plaintiffs acquiescence thereto, and of the entire record, it is this 2d day of October, 1979, hereby

ORDERED that defendant's motion be, and it hereby is, granted; and it is

FURTHER ORDERED that this Court's Order of August 7, 1979 directing defendant to disclose to plaintiff the names of institutions that participated in the so-called MK-ULTRA project under the auspices of the CIA is stayed pending a ruling on appeal of that order.

/s/ Louis F. Oberdorfer
LOUIS F. OBERDORFER
*United States District Judge*

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251

Filed: Nov. 30, 1979

JOHN CARY SIMS AND SIDNEY M. WOLFE, M.D.,
PLAINTIFFS,

*v.*

CENTRAL INTELLIGENCE AGENCY, DEFENDANT.

## ORDER

IT IS HEREBY ORDERED that plaintiffs' motion for a summary judgment requiring disclosure of the identities of the principal researchers of defendant's MK-ULTRA projects is granted, and defendant's motion for a contrary summary judgment is denied. Defendant shall disclose the identities of the principal researchers on or before January 30, 1980. In the event of appeal, this Order is stayed until the return of the Court of Appeals mandate, unless otherwise ordered.

/s/ Louis F. Oberdorfer
LOUIS F. OBERDORFER
*United States District Judge*

Date: NOVEMBER 30, 1979

## APPENDIX H

## STATUTORY PROVISIONS INVOLVED

1. The Freedom of Information Act, 5 U.S.C. 552, provides in part:

* * * * *

> [(a)(4)] (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * * * *

> (b) This section does not apply to matters that are

* * * * *

> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

* * * * *

2. Section 102 of the National Security Act of 1947, ch. 343, 61 Stat. 498, 50 U.S.C. 403, provides in part:

* * * * *

> (d) *Powers and duties.*
>
> For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Agency, under the direction of the National Security Council—

* * * * *

> (3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: *Provided*, That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions: *Provided further*, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence: *And provided further*, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;

3. Section 6 of the Central Intelligence Agency Act of 1949, ch. 227, 63 Stat. 211, 50 U.S.C. 403g, provides in part:

> In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of section 654 of Title 5, and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency: *Provided*, That in furtherance of the section, the Director of the Office of Management and Budget shall make no reports to the Congress in connection with the Agency under section 947(b) of Title 5.

# RESPONDENT'S

# BRIEF

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 83-1075

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1983

CENTRAL INTELLIGENCE AGENCY
and WILLIAM J. CASEY,
DIRECTOR OF CENTRAL INTELLIGENCE,

*Petitioners,*

v.

JOHN CARY SIMS and SIDNEY M. WOLFE,

*Respondents.*

## MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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February 1984

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1075

CENTRAL INTELLIGENCE AGENCY
and WILLIAM J. CASEY,
DIRECTOR OF CENTRAL INTELLIGENCE,

*Petitioners,*

v.

JOHN CARY SIMS and SIDNEY M. WOLFE,

*Respondents.*

## MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

## COUNTERSTATEMENT OF THE CASE

With one exception, respondents do not dispute the facts set forth in petitioners' statement: the district court did not order disclosure of the names of all the institutions, as petitioners claim. Pet. at 5. Rather, the court ordered the disclosure of "all institutions except those involved with researchers found to be exempt." Pet. App. at 27a.[1] More important, however, there are a number of substantial omissions from the CIA's statement which bear directly on the question of whether the Court should grant review in this case.

---

[1] Respondents have challenged the propriety of the court of appeals' apparent affirmance of this aspect of the district court's decision in their cross-petition for a writ of certiorari, No. 83-1249, which was filed on January 27, 1984.

1. Nowhere does the CIA acknowledge that throughout this litigation it has expressly declined to exercise its authority to classify the records at issue, thereby permitting it to withhold the records pursuant to the national security exemption to the Freedom of Information Act, 5 U.S.C. § 552(b)(1). Nor does the CIA acknowledge that these documents were once classified, but were declassified some time ago by the CIA. Pet. App. at 79a, 90a.

2. The CIA fails to mention several important aspects of the court of appeals' initial decision in this case, which established the "intelligence source" test at issue here. *Sims v. CIA*, 642 F.2d 562 (D.C. Cir. 1980)("*Sims I*"). First, in describing the court of appeals' definition of the term "intelligence source," the CIA ignores an important caveat added by the court. Immediately after propounding its definition, the court made it clear that "substantial weight" should be accorded to the agency's factual allegations in the area of national security. Pet. App. at 51a. It went on to note that "courts should not require the impossible" of the agency by imposing unreasonably high evidentiary burdens. *Id.*

Nor does the CIA acknowledge that, throughout these proceedings, the district court has shown great deference to the agency's factual allegations, and it has fashioned procedures which permitted the agency repeated opportunities to make its case. Pet. App. at 29a. Indeed, the court went so far as to accept *in camera* affidavits, and on five different occasions heard extensive argument from CIA counsel and CIA officials in *in camera, ex parte* proceedings to enable the agency to meet the very test which it now says creates an impossible burden. In fact, despite the CIA's complaints about the rulings of the courts below, the agency has not yet been compelled to disclose the name of a single researcher or institution.

3. Petitioners' statement contains only a brief description of the MKULTRA program, which is the subject of

respondents' request, undoubtedly because the program involved matters far removed from what is normally thought to be the intelligence mission of the agency. However, many of the facts surrounding what the court of appeals and Congress have described as the "abuses" and "grisly details" of MKULTRA have not been made public, *e.g.*, Pet. App. at 2a, 37a, because most of the records relating to MKULTRA were deliberately destroyed by the CIA in 1973 in order to prevent the existence and nature of the program from being "misunderstood" by the public. *See Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Final Report: Foreign and Military Intelligence,* S. Rep. No. 755, 94th Cong., 2d Sess. 404 (1976); Marks, *The Search for the Manchurian Candidate* 205 (1979). The records at issue here would help shed light on this controversial chapter of the CIA's history.

While there is much that the public has yet to learn about MKULTRA, it is clear that the program, which was initiated thirty years ago and whose existence and details have all been declassified by the CIA, involved a series of "subprojects," many of which related to topics that are clearly at or beyond the outer periphery of what is generally considered "intelligence." *E.g.*, Pet. App. at 78a-79a. Included among these were "a study of current problems in vocational guidance," "research on the ecological relations involved in the deterioration of petroleum products," "an exploration of the usefulness of mechanization in foreign language training," and "a study of blood groupings as a means of identifying individuals." Pet. App. at 5a *quoting* Pet. App. at 25a-26a. Several other subprojects involved the preparation of a "sleight of hand manual" by a magician. CIA's Answers to Interrogatories of November 13, 1980 at 10 (filed on March 12, 1981).

4. The CIA's statement also overlooks two other key facts. At the outset of the litigation, the district court urged the CIA to contact the researchers involved in MKULTRA directly, to

ascertain whether they had any objections to the disclosure of their identities, and to determine whether they had sought or had been offered confidentiality in return for their cooperation with the agency. Pet. App. at 70a. The request was particularly appropriate here since the CIA, on its own initiative, had contacted the 80 institutions involved. As a result, it released the identities of the 59 institutions which agreed to have their names revealed, and withheld the identities of the remaining 21 institutions which had either objected or failed to respond to the CIA's inquiry. Yet, for reasons known only to itself, the CIA declined to follow a parallel procedure with respect to the researchers. *See* Pet. App. at 39a, 62a, 70a.

Equally important, the CIA fails to acknowledge that many of the researchers (and institutions) which participated in MKULTRA were "unwitting" -- *i.e.*, they had no inkling that the CIA was sponsoring their research. Pet. App. at 37a. This fact is important because nowhere does the CIA confront the obvious problem that if a source is entirely unaware of CIA involvement, he or she would hardly be deterred from assisting the CIA because of any real, let alone perceived, inability of the agency to protect its sources.

## REASONS FOR DENYING THE WRIT

In its petition, the CIA urges this Court to take this case for one reason and one reason alone -- to overturn the definition of the term "intelligence source" fashioned by the court of appeals in *Sims I*. Under that ruling, an "intelligence source" is

> a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind that the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

Pet. App. at 50a. In its place, the CIA asks the Court to endorse a sweeping construction of the term which would effectively give the agency unfettered discretion to decide for itself what constitutes an intelligence source. According to the CIA, even judicial review cannot be countenanced because the mere possibility that a court might someday require disclosure of a source will undermine the agency's credibility and make it much more difficult for the CIA to recruit sources. There are five principal reasons why no review by this Court is required to enable the CIA to protect the identities of its sources of intelligence.

1. Although the CIA rattles the sabres of national security, it has renounced reliance on the FOIA's national security exemption, even though the very records at issue here were once classified. To the extent that the CIA's underlying concern is that the disclosure of source information "will reveal the nature of highly sensitive CIA investigations and projects," or compromise the CIA's ability to recruit sources, *see* Pet. 8-12, those concerns are properly addressed through the classification process and Exemption 1.

Indeed, the Executive Order governing classification specifically empowers the CIA to classify "intelligence sources and methods," "confidential sources," "intelligence activities," and many other categories of information, provided that the CIA can show that unauthorized disclosure could reasonably be expected to damage the national security. Executive Order 12356, § 1.3, 47 Fed. Reg. 14875 (April 2, 1982). In addition, many of the types of information the CIA claims would be jeopardized by the court of appeals' test would be protectable as "intelligence methods" under 50 U.S.C. § 403(d)(3), or under 50 U.S.C. § 403g, which exempts the CIA from the provisions of any statute requiring disclosure of the identities of CIA employees (including *paid* sources) or of its functions or organization.

The CIA's refusal to defend its withholding on Exemption 1 grounds prompted the district court in its initial decision to urge the agency to consider reclassifying the documents, emphasizing that "[n]othing in the Court's ruling is intended to foreclose (or approve) new classification of the lists and resort to section (b)(1) in order to protect any commitment to anonymity made by defendants . . . ." Pet. App. at 80a. To assist the CIA, the court stayed the effective date of its ruling "in order to permit the defendant to reexamine and act on the possibility of classifying the names of institutions and researchers" and "to invoke (b)(1), if it should elect to do so." *Id.* Despite this and other similar invitations by the lower courts (*see* Pet. App. at 2a, 21a & 49a), the CIA, without explanation, has expressly renounced reliance on Exemption 1. As the district court observed, the agency's purpose in declining to exercise its rights under Exemption *1* was apparently to pressure the courts into giving a broad reading to section 403(d)(3). Transcript of *Ex Parte* Proceeding Before the District Court, at 7-12 (February 9, 1982).

The CIA's petition also ignores the personal privacy claim that it originally advanced in support of withholding the researchers' names. *See* 5 U.S.C. § 552(b)(6). In the first appeal the CIA unsuccessfully argued that revelation of the researchers' names would constitute an unwarranted invasion of their privacy, but it has not asked this Court to consider that claim. Thus, to the extent that the CIA now professes concern over the privacy rights of the researchers, that concern relates to Exemption 6, which is not before the Court, even though that exemption is designed to protect against precisely the sort of embarrassment, harassment, and worse which the CIA invokes as a reason to grant certiorari in this case. Pet. at 10.

Therefore, all of the types of information that the CIA suggests might be threatened by the court of appeals' ruling in *Sims I* can be fully safeguarded pursuant to these other provisions, even if the agency's doomsday readings of the *Sims I* test were in any way justified.

2. The CIA's criticisms of the *Sims I* test are either misplaced or seriously overstated. The CIA begins its argument by claiming that application of the court of appeals' standard "would require the government to disclose its intelligence sources in many circumstances in which it is entirely clear that disclosure will interfere with the Agency'S ability to carry out its mission" because the CIA will be unable to meet the "need for confidentiality" component of the *Sims I* test. Pet. at 9-12. This argument is untenable for several reasons.

To begin with, where the agency's ability to carry out its mission is threatened, the CIA can simply classify the documents and invoke Exemption 1 (and other provisions) as a bar to disclosure. Moreover, in most cases -- and in all of the examples cited in the CIA's petition, including the "public" source examples -- the CIA should be more than able to satisfy the *Sims I* test. Thus, the agency should readily be able to show that confidentiality was in fact required, either from the nature of the information sought or from the nature of the agency's relationship to the source. Under *Sims I*, courts have found a need for confidentiality for sources which were, using the CIA's example, foreign nationals. *E.g.*, *Jaffe v. CIA*, 573 F. Supp. 377, 384-85 (D.D.C. 1983); Pet. App. at 31a. Similarly, the need for confidentiality would properly be found if the information obtained concerned "sensitive information, [such as] a report of a crop failure" or "the nature of highly sensitive CIA investigations and projects," Pet. at 8-11, and might also be protectable under the "intelligence methods" prong of section 403(d)(3). The reason that the agency has had such difficulties in this case is because MKULTRA might well have been beyond the scope of the CIA's mandate, which sharply limits its domestic activities. At the very least, the program operated at the outer edge of the agency's mission, whereas the examples cited by the CIA in its petition are at the core of its intelligence gathering functions.

Moreover, it is not simply respondents' view that the CIA's concerns with *Sims I* are vastly overstated. The district court emphasized that if this case bore any similarity to the typical cases described in the CIA's affidavits and submissions, it "would not hesitate to apply the (b)(3) exemption" to protect the documents from disclosure. Pet. App. at 78a. The court of appeals agreed. Pet. App. at 49a. Even the name of "an obscure Eastern European" technical journal would be withheld under *Sims I* if, as the CIA suggests, revelation that the CIA reviews the journal "could easily thwart the CIA's efforts to exploit its value . . . ." Pet. at 14. And, although the *Sims I* test has been on the books for over three years, it has not led to the wholesale disclosure of sensitive intelligence sources protected by the CIA. *Cf. Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982).

The reason for this, and what the CIA glosses over, is that this case is aberrational: it involves a purely domestic, scientific research program conducted by researchers who, by and large, had no idea that they were even working for the CIA, and who were conducting research on topics far removed from what is generally conceived of as "intelligence" work. *See* Pet. App. at 78a-79a. Thus, as the court of appeals found, and as three years experience has shown, application of the *Sims I* test will not lead to the disclosure of sensitive source information as the CIA predicts. Pet. App. at 49a.

The CIA's second argument -- that the *perception* that some court *might* some day require the disclosure of an intelligence source hinders the agency's ability to recruit sources -- is no more compelling. As noted above, the CIA has more than adequate *tools* at hand to protect intelligence sources, and thus it is unlikely that this "perception" problem will arise. Moreover, it bears noting that in making this argument, the CIA distorts the nature of its commitment to these researchers. In this case, all of the evidence demonstrates that virtually the only pledge of confidentiality made was the one

the CIA extracted from many of the witting researchers, ensuring that the CIA's interest in the research would not be revealed by the researcher, not the other way around. For all but a handful of the researchers, there is no evidence whatsoever suggesting that the researcher sought a pledge of confidentiality from the agency. By contrast, a few researchers were expressly promised confidentiality, and in those cases the district court permitted the CIA to withhold their identities. Pet. App. at 31a. Moreover, while the CIA may at times promise confidentiality, it has also breached such pledges on occasion to advance its own interests, leaving the source with no "remedy" regardless of the danger he faces. In fact, the CIA voluntarily disclosed the identity of the researcher involved in the most sensitive MKULTRA subproject -- the establishment of safehouses in major cities, in which unwitting subjects were given mind-altering drugs -- as well as several other researchers involved in MKULTRA. CIA's Answers to Interrogatories of November 13, 1980 at 9, 17 (filed on March 12, 1981); *Project MKULTRA, the CIA's Program of Research in Behavioral Modification: Joint Hearings Before the Select Comm. on Health and Scientific Research of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 50-58 (1977).

Nonetheless, the CIA uses its "perception" argument as the foundation for its thinly-veiled plea for an interpretation of section 403(d)(3) which would give the Director of Central Intelligence unreviewable authority to determine what constitutes an "intelligence source." Courts can play no role in the process because, the CIA claims, they are perceived as "unpredictable institutions" which may some day order the agency to betray its promises. Pet at 10-11. According to the CIA, the term "intelligence source" must be defined so broadly that even the *New York Times*, *Pravda*, and the public library would fall within the sweep of section 403(d)(3). Pet. App. at 46a. As Chief Judge Markey correctly observed in his partial dissent in *Sims I*, the CIA's argument requires the substitution of the term "*information* source" for the statutory term "intelligence source." Pet. App. at 61 (emphasis added). Because the CIA's interpretation completely reads the word "intelligence" out of the statute, the court of appeals was unable to accept it and was thus compelled to formulate a definition.[3]

There is another, equally fatal flaw in the CIA's argument that it can withhold these records based on its sweeping construction of section 403(d)(3). If that provision were as open-ended as the CIA suggests, it would not qualify as a sufficiently specific statute to fall within the ambit of Exemption 3 --both prongs of which require clear, legislatively determined rules of withholding and impose very strict limitations on the reach of administrative discretion. *See, e.g., Lee Pharmaceuticals v. Kreps*, 577 F.2d 610, 614-16 (9th Cir.), *cert. denied*, 439 U.S. 1073 (1979); *American Jewish Congress v. Kreps*, 574 F.2d 624, 628-29 (D.C. Cir. 1978). In fact, Exemption 3 was amended in 1976 in light of this Court's decision in *Administrator, FAA v. Robertson*, 422 U.S. 225

(1975), to make clear that statutes which confer broad administrative discretion cannot qualify under Exemption 3. Thus, if this Court agrees with the CIA's expansive construction of section 403(d)(3), the section cannot qualify as an Exemption 3 statute, since the agency, not Congress, would be setting the limits of non-disclosure. *Cf.* Pet. App. at 76a-78a. Therefore, the court of appeals' ruling was not, as the CIA suggests, merely an attempt to formulate a definition that would further only the disclosure goals of the FOIA, but rather was an effort to construe section 403(d)(3) in a manner which preserved its integrity as an Exemption 3 statute.

3. The CIA's interpretation of section 403(d)(3) also cannot be reconciled with Congress' 1974 amendment to the FOIA relating to classified national security information, which was prompted by this Court's decision in *EPA v. Mink*, 410 U.S. 73, 81-84 (1973). In *Mink*, the Court affirmed the nondisclosure of classified information under Exemption 1 solely on the basis of an agency affidavit, reading Exemption 1 to preclude judicial review of the propriety of the classification determination. Congress promptly amended Exemption 1 to ensure that the courts would review classification decisions and determine *de novo* whether the information is "in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1)(1976). Thus, Congress has concluded that even the most sensitive national security documents may not be automatically withheld simply on the word of the agency, but that the courts may review these decisions, although in doing so the court is required to accord agency affidavits substantial deference.

Nowhere does the CIA seek to justify its expansive reading of section 403(d)(3) in the face of Congress' express rejection of virtually the identical claim for broad and unreviewable secrecy made by the Executive Branch when Congress sought to alter the result in *Mink*. *See Ray v. Turner*, 587 F.2d 1187, 1192-94 (D.C. Cir. 1978); *id.* at 1206-09 (Wright, C. J., concurring) (reviewing legislative history of amendment). Indeed, it would defy common-sense for Congress to have demanded that the courts examine *de novo* the CIA's classification decisions concerning the most vital of our Nation's secrets, but nonetheless conferred on the CIA the untrammeled and unreviewable authority to withhold *unclassified* documents alleged to contain source material. Moreover, the CIA's perception argument would apply with even greater force to documents which have actually been stamped Top Secret, but it is plain that Congress was not swayed by such considerations in its 1974 amendments to Exemption 1, nor should this Court be in its construction of section 403(d)(3).

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[3] The CIA contends that its broad definition is compelled by the provision's legislative history and its "plain meaning." But the fragments of legislative history which the CIA relies on do not help its case. While Congress may have been aware that the CIA derived "intelligence" from public as well as clandestine sources, nothing in the legislative history supports the CIA's claim that Congress intended to grant the CIA unbridled authority to withhold *any* source of information without some showing that the source provided "intelligence," or that there was some need for confidentiality. Moreover, the CIA's citation to the legislative history is highly selective. The sponsors of the National Security Act of 1947 were primarily concerned with the division of responsibility after consolidation of national security and defense functions. As a result, there is virtually no indication of what Congress intended by the term, except Representative Holifield's description of the limits of CIA activity:

> I want to impress upon the minds of members that the work of the Central Intelligence Agency, as far as the collection of data is concerned, is strictly in the field of *secret foreign intelligence -- what is known as clandestine intelligence*.

93 Cong. Rec. 9430 (1947)(emphasis added). There simply can be no claim that the researchers at issue here provided anything of the sort.

4. The CIA's statements before this Court cannot be squared with its representations to Congress. Within the past year, the CIA has urged Congress to enact S. 1324 and H.R. 3460, which would exempt the CIA's open "operational" files from the FOIA but in no way amend section 403(d)(3). *See* 129 Cong. Rec. S. 16742-46 (daily ed. Nov. 17, 1983) (reporting S. 1324 out of committee). *See also* S. Rep. No. 98-305, 98th Cong., 1st Sess. 6-17 (1983). CIA officials have stated that the bill "will send a clear signal to our sources and to those we hope to recruit that the information which puts them at risk will no longer be subject to the [FOIA] process." Testimony of CIA Deputy Director John N. McMahon before the Senate Select Committee on Intelligence, at 7 (June 21, 1983). The CIA has also stressed that adoption of S. 1324 would "do away with the perception that a number of our sources have that they are threatened because of the present FOIA," *id.*, and that the bill would fully address the concerns raised by Judge Bork in his dissent in *Sims II*. *Id.* at 8. The Administration has advised Congress that it "has no intention to seek additional FOIA relief for the Agency." S. Rep. No. 98-305, *supra*, at 8.[3]

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[3] Prior to the introduction of S. 1324, the CIA had for some time sought a blanket exemption from the FOIA. However, when it became clear that Congress intended to continue FOIA coverage, the agency then sought the more narrow relief provided by S. 1324.

It is not possible to reconcile the CIA's assertions before Congress -- that protecting operational files will cure the "perception" problems without any change in section 403(d)(3), as interpreted in *Sims I* in 1980 and reaffirmed in June 1983 in *Sims II* -- with the agency's claim in this Court that review is vital to our national security. Moreover, the protections in S. 1324 are limited to active, operational files and thus would not apply to the records at issue here, or, for that matter, to any inactive program, which further suggests that Congress, and for that matter the CIA, have no quarrel with the result in this case. Finally, given the considerable attention focused on the question of "source" protection before Congress, and the strong likelihood that Congress will soon act to give the CIA precisely the protection it has requested from Congress in S. 1324, the CIA's failure to offer any explanation of why this Court should not simply let the legislative process run its course, further counsels against review.

5. The CIA also sidesteps the fact that it is seeking review of a court of appeals decision handed down over three years ago. The question presented for review in this case is the appropriate scope of the term "intelligence sources" contained in section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3). However, that standard was formulated in September 1980 in *Sims I* (Pet. App. at 35a), not in the more recent ruling of the court of appeals, from which the agency is purportedly petitioning. But when *Sims I* was issued, the CIA filed no petition for rehearing or rehearing *en banc* -- indeed, it filed a bill of costs. Nor did it seek this Court's review. In *Sims II*, the court of appeals simply applied the *Sims I* test; it did not purport to modify or refine in any respect the test which it had announced in *Sims I* and had applied in other cases in the three intervening years. Nor did it order the disclosure of any documents, but rather it remanded the case once again for further proceedings. These facts relating to the timing of the CIA's challenge to the *Sims I* test suggest that it

is either too late, since the alleged "chill" resulting from *Sims I* has been ongoing for over three years, or too early, since no harm can yet befall the agency because no records have been ordered released.

## CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

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# REPLY
# BRIEF

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No. 83-1075

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# In the Supreme Court of the United States

OCTOBER TERM, 1983

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CENTRAL INTELLIGENCE AGENCY AND
WILLIAM J. CASEY, DIRECTOR OF
CENTRAL INTELLIGENCE, PETITIONERS

*v.*

JOHN CARY SIMS AND
SIDNEY M. WOLFE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## REPLY BRIEF FOR THE PETITIONERS

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The most notable feature of the Memorandum in Opposition is that respondents do not even attempt to defend the court of appeals' definition of "intelligence sources." In the petition, we showed that the court of appeals' definition is without support in the language or legislative history of the National Security Act of 1947 or any other statute (Pet. 15-19). Respondents make no effort to answer our argument.

Instead, respondents contend principally that the court of appeals will not, in the future, take seriously a definition it has repeatedly affirmed, and that the CIA can, in any event, manipulate other FOIA exemptions to reduce the damage caused by the court of appeals' definition of "intelligence sources."

1. Respondents repeatedly assert (see Memo. in Opp. 5-7) that the CIA need not rely on Exemption 3 of the FOIA because it can protect intelligence sources under Exemption 1, 5 U.S.C. 552(b)(1), which permits the government to withhold information properly classified under Exec. Order No. 12356, 47 Fed. Reg. 14874 (1982). But as this Court has recently ruled, the interpretation of an FOIA exemption should not be distorted because a different exemption may also apply to some of the same documents (see *FBI* v. *Abramson*, 456 U.S. 615, 629-630 (1982)).

Exemption 1 and Exemption 3 are separate provisions that serve distinct purposes. The District of Columbia Circuit itself has recognized this point (see *Gardels* v. *CIA*, 689 F.2d 1100, 1107 (1982)). Exemption 3 and 50 U.S.C. 403(d)(3) constitute a congressional direction to the Agency to "protect[] intelligence sources and methods from unauthorized disclosure."[1] The existence of Exemption 1 is simply

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[1] Indeed, the protection for "intelligence sources and methods" was added by Congress itself to the bill that became the National Security Act of 1947; it was not part of the Administration draft. Compare H.R. 2319, 80th Cong., 1st Sess. § 202 (1947), with H.R. 4214, 80th Cong., 1st Sess. § 105(d)(3) (1947); see H.R. Rep. 961, 80th Cong., 1st Sess. 1-4 (1947).

Respondents do not deny that the function of Exemption 3 is to incorporate by reference the standards specified in other statutes (see Pet. 18); they do not, and cannot, deny that 50 U.S.C. 403(d)(3) is one of the statutes incorporated by reference in Exemption 3 (see Pet. 18); and, as we have said,

not a reason to thwart this congressional design. A Senate committee considering the effects of the FOIA on the CIA has recently made this point, which is in any event clear from the text of the statute itself (S. Rep. 98-305, 98th Cong., 1st Sess. 21 (1983)):

> The FOIA already exempts information concerning intelligence sources and methods from publication or disclosure. If properly classified, such information is exempt under subsection (b)(1) of the Act. Even if the information concerning sources and methods is unclassified, there is a separate exemption under subsection (b)(3) for such information so the [Director of Central Intelligence] can fulfill his statutory duty under the National Security Act to protect intelligence sources and methods.

Moreover, respondents take a cavalier view of the Director's authority to classify documents when they suggest that it is a simple matter to classify any information that might impair the CIA's operations by revealing the identity of an intelligence source. Executive Order 12356 specifies particular criteria that information must meet in order to be classified; information cannot be classified at all unless its "disclosure * * * reasonably could be expected to cause damage to the national security" (Exec. Order No. 12356, Sec. 1.1(a)(3)). The disclosure of information that reveals the identities of intelligence sources

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they suggest no reason to believe that Congress intended the phrase "intelligence sources and methods" in Section 403(d)(3) to have anything other than its plain meaning. Respondents' argument that, under our approach, Section 403(d)(3) could not be an Exemption 3 statute (Memo. in Opp. 10-11) is therefore insubstantial.

might seriously interfere with the CIA's operations even if it does not satisfy this standard.[3]

The Director should not be placed in the position of being forced to classify information that reveals the identities of intelligence sources solely in order to prevent its public dissemination under the FOIA—especially when Congress has specifically authorized him to withhold such information whether or not it is classified. It is not good policy, and it is not consistent with the philosophy of either the FOIA or Executive Order 12356, for the Director to have to classify information that he would otherwise leave unclassified in order to limit the damage caused by an interpretation of Section 403(d)(3) that has no foundation in the law. Indeed, the fact that the court of appeals' approach, if it prevails, might force the Director to classify information that would otherwise remain unclassified is an additional reason for this Court to review the court of appeals' decision.

2. Respondents err when they suggest (Memo. in Opp. 7-8) that the court of appeals overturned the district court's refusal to disclose MKULTRA researchers because those researchers were engaged in an activity that did not really involve the gathering of intelligence. The district court specifically rejected respondents' contention that MKULTRA research was not "needed to perform the CIA's intelligence function" and ruled that the Agency "could reasonably determine that this research was needed for its intelligence function" (Pet. App. 22a-23a). The court of appeals did not question that ruling.

Thus, the premise of the court of appeals' decision was that the researchers were sources of intelligence information; but the court ruled that their identities would nonetheless be subject to disclosure. It is for precisely that reason that the court's decision is so inconsistent with Congress's intentions and poses a threat to the CIA's operations.

3. Respondents make the related contention (Memo. in Opp. 7-8) that this case is an aberration and that in the future the court of appeals' definition will not be applied if doing so would cause the identities of intelligence sources to be revealed. Although we would like to be able to share respondents' view, there is no basis for their confident prediction. As we pointed out in the petition, in *Fitzgibbon* v. *CIA*, Civil Action No. 79-0956 (D.D.C. Nov. 10, 1983), motion for reconsideration pending, Judge Greene ruled that the court of appeals' decision in this case required the disclosure of CIA sources in the Dominican Republic who provided information about the Trujillo regime—surely a clear example of intelligence sources of the kind that Congress wished to protect (see Pet. 11 n.2, 15). Respondents make no mention of *Fitzgibbon*.

Moreover, we determined not to seek review of *Sims I* in part because we believed that the court of appeals might not have fully appreciated the ramifications of the abstract definition it propounded in that decision.[4] When the case came before the court of appeals the second time, we urged the court to reconsider the portion of the *Sims I* definition that leads to the unacceptable consequences we have described. Judge Bork made similar arguments in his dissenting opinion (Pet. App. 13a-15a). The court of appeals' response was: (i) to note that the *Sims I* definition had been endorsed by two other panels of the District of Columbia Circuit (Pet. App. 4a & n.6, citing *Holy Spirit Association for the Unification of World Christianity v. CIA*, 636 F.2d 838, 844 (1980), vacated, 455 U.S. 997 (1982), and *McGehee v. CIA*, 697 F.2d 1095, 1112 n.78 (1983)); (ii) to dismiss our suggestion that the *Sims I* definition be reconsidered as "either disingenuous or obtuse" (Pet. App. 4a); and (iii) to apply that definition extremely rigidly, to the point of ordering that the Agency be required to break explicit promises of confidentiality (Pet. App. 6a). It is clear, therefore, that the court of appeals is entirely serious about enforcing its definition of "intelligence sources."

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[3] For example, a sensitive CIA source might provide information from commercial documents available in a foreign country. That information is theoretically in the public domain, and the Director might determine that he is unable to classify it. But if the CIA disclosed that it possessed such information, it might well reveal the identity of the source.

[4] Respondents criticize us for not seeking review of *Sims I* (Memo. in Opp. 13-14)—a criticism that is quite inconsistent with their argument that we are overreacting to what the court of appeals has done in this case.

4. Respondents repeatedly assert—without a single citation to the petition—that the CIA is seeking "unfettered" and "unreviewable" discretion to decide what constitutes an intelligence source. See, *e.g.*, Memo. in Opp. 3 ("According to the CIA, even judicial review cannot be countenanced"); *id.* at 9 ("[the Agency's] thinly-veiled plea for * * * unreviewable authority"); *id.* at 10-11 & n.2; *id.* at 12 ("untrammeled and unreviewable authority"). The Agency makes no such claim. In any event, respondents' assertions address an issue not involved in this case.

This case concerns the definition of the term "intelligence sources." The agency's position is that that phrase should be given its plain meaning—sources of intelligence information. This case does not concern the degree of discretion the Agency should be given

in determining whether a particular person or institution is a source of intelligence information. We would note, however, that the Agency freely concedes that such determinations are reviewable in court according to a proper standard of review.

5. Respondents further suggest (Memo. in Opp. 12-13) that proposed legislation now being considered by Congress will solve the problems created by the court of appeals' definition of "intelligence sources." The proposed legislation to which respondents refer, however, is addressed to an entirely different issue.

The bills in question—S. 1324, 98th Cong., 1st Sess. (1983), H.R. 3460, 98th Cong., 1st Sess. (1983), and H.R. 4431, 98th Cong., 1st Sess. (1983)—provide that, while the FOIA will continue to apply to the CIA in general, certain CIA operational files need not be searched in response to an FOIA request, no matter what kinds of information they contain (subject to certain specific exceptions). The proponents of this legislation, including the Agency, have pointed out that decisions whether to disclose material from these files must be made with painstaking care by highly trained intelligence officers who know the potential significance of apparently innocuous pieces of information, thus taxing the Agency's resources and impairing its ability to process all FOIA requests promptly. At the same time, the potential benefit to the public is slight, because operational files are highly sensitive and in the end the FOIA requires the disclosure of very little information from them. The Agency has urged that in view of this balance of costs and benefits, and of the danger of an inadvertent disclosure of sensitive information from these files, it is more sensible for Congress to provide that operational files need not be searched at all. See, *e.g.*, S. Rep. 98-305, at 10-12; *S. 1324, An Amendment to the*

*National Security Act of 1947: Hearings Before the Senate Select Comm. on Intelligence*, 98th Cong., 1st Sess. 5-9 (1983) (testimony of John McMahon).

Even if the proposed legislation were to pass, which is far from certain, it would not solve the problems created by the court of appeals' definition. That is because information revealing the identities of intelligence sources is not confined to the operational files covered by the bills; it is found in certain nonoperational CIA files as well. Moreover, the concerns that have given rise to this proposed legislation are quite distinct from the problems posed by the court of appeals' definition. Indeed, in considering these bills, Congress has assumed that Exemption 3 broadly exempts from the FOIA all information that would disclose the identities of intelligence sources. See, *e.g.*, S. Rep. 98-305, at 13 ("Virtually all of [the] information [in operational files] * * * has always been withheld from FOIA release by exemption (b)(1) for classified information and exemption (b)(3) for information pertaining to intelligence sources and methods"); *id.* at 21 (quoted at page 3, *supra*); *id.* at 21-22 ("[I]nformation contained solely in these file[] systems has been protected thus far from release to the public under exemptions (b)(1) and (b)(3) of the FOIA."); *id.* at 22. See also S. 1324, § 2(a)(10). The court of appeals' definition, therefore, undercuts the very premise on which the proposed legislation is based.

6. Finally, respondents suggest (Memo. in Opp. 14) that review is unnecessary because the courts below have not yet finally ordered that any information be disclosed. But we are seeking review because of our concern with the court of appeals' definition of "intelligence sources," not solely because of the application of that definition to particular documents. As we have noted, the court of appeals has unequivocally affirmed its definition, and that definition will govern the Agency's relationship to its sources and its ability to keep its sources secret no matter what the final outcome of this particular case. We note that in the past the Court has not hesitated to grant certiorari in FOIA cases in an interlocutory posture where similar considerations were present. See, *e.g.*, *United States Department of State* v. *Washington Post Co.*, cert. granted, No. 82-1925 (Oct. 3, 1983), vacated and remanded with instructions to dismiss the complaint as moot (Nov. 14, 1983); *FTC* v. *Grolier, Inc.*, No. 82-372 (June 6, 1983); *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975).

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
*Solicitor General*

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# PETITIONER'S

# BRIEF

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# In the Supreme Court of the United States

OCTOBER TERM, 1983

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*v.*

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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# QUESTION PRESENTED

Whether the Central Intelligence Agency must disclose the identity of a source of intelligence information under the Freedom of Information Act whenever it cannot demonstrate that it had to guarantee confidentiality in order to obtain the kind of information that the source supplied, even though Section 102(d)(3) of the National Security Act of 1947, as incorporated in Exemption 3 of the FOIA, exempts "intelligence sources" from disclosure.

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# In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1075

CENTRAL INTELLIGENCE AGENCY AND
WILLIAM J. CASEY,
DIRECTOR OF CENTRAL INTELLIGENCE, PETITIONERS

*v.*

JOHN CARY SIMS AND SIDNEY M. WOLFE

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE PETITIONERS

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 709 F.2d 95. The opinions and order of the district court (Pet. App. 21a-34a) are unreported. An earlier opinion of the court of appeals (Pet. App. 35a-64a) is reported at 642 F.2d 562. One of the earlier opinions of the district court (Pet. App. 73a-93a) is reported at 479 F. Supp. 84; the other earlier opinions and orders of the district court (Pet. App. 66a-72a, 94a-97a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on June 10, 1983 (Pet. App. 19a-20a). A petition for rehearing was denied on August 17, 1983 (Pet. App. 17a). On November 9, 1983, the Chief Justice extended the time in which to file a petition for a writ of certiorari to December 15, 1983, and on December 5, 1983, the Chief Justice further extended the time in which to file a petition for a writ of certiorari to December 29, 1983. The petition was filed on that date and was granted on March 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Portions of the Freedom of Information Act, 5 U.S.C. 552, the National Security Act of 1947, 50 U.S.C. 401 *et seq.*, and the Central Intelligence Agency Act of 1949, 50 U.S.C. 403a *et seq.*, are reproduced at App., *infra*, 1a-3a.

## STATEMENT

1. Respondents, invoking the Freedom of Information Act (FOIA), 5 U.S.C. 552, filed a request with the Central Intelligence Agency seeking certain information about a CIA project known as MKULTRA. MKULTRA was initiated in the 1950's in "response to possible use by the Soviets and the Chinese of chemical and biological agents as instruments of interrogation and brainwashing" (Pet. App. 37a (footnote omitted); see *id.* at 73a). The project involved "research into 'chemical, biological and radiological materials capable of employment in clandestine operations to control human behavior'" (*id.* at 21a (footnote and citation omitted)). See also Pet. App. 89a (affidavit of Director of Central Intelligence Turner).

MKULTRA research was conducted by a large number of private scientists, in the United States and abroad, affiliated with universities, research foundations, and similar institutions (Pet. App. 66a, 89a). At least 80 institutions and 185 private researchers participated (*id.* at 36a). A total of 149 subprojects were funded by the CIA (I C.A. App. 14-61).[1]

Most of these subprojects involved legitimate research into a variety of chemical, biological, psychological, and sociological subjects. In a few of the subprojects, researchers surreptitiously administered drugs to unwitting subjects. This wholly improper conduct is now expressly forbidden by executive order. Exec. Order No. 12,333, Section 2.10, 46 Fed. Reg. 59941, 59952 (1981). See also *Project MKULTRA, the CIA's Program of Research in Behavioral Modification: Joint Hearing Before the Select Comm. on Intelligence and the Subcomm. on Health and Scientific Research of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 16, 17, 35 (1977) (testimony of Director of Central Intelligence Turner) (hereinafter cited as *Project MKULTRA Hearing*). The CIA has attempted to notify the persons who were unwittingly subjected to tests. See *id.* at 36.

The MKULTRA project was examined in 1963 in a report from the Inspector General of the CIA to the Director of Central Intelligence (II C.A. App. 118-145). Subsequently, congressional committees and a Presidential commission thoroughly examined the project, taking extensive testimony from both the Director of Central Intelligence and the former CIA personnel who had supervised the project. These inquiries gave "broad publicity" (Pet. App. 37a) to MKULTRA and the allegations of abuses connected with it. See S. Rep. 94-755, 94th Cong., 2d Sess., Bk. I, at 389-392 (1976); *Report to the President by the Commission on CIA Activities Within the United States* 226 (June 1975); *Human Drug Testing by the CIA, 1977: Hearings on S. 1893 Before the Subcomm. on Health and Scientific Research of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. (1977); *Project MKULTRA Hearing, supra*.

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[1] "I C.A. App." refers to the Joint Appendix filed in the court of appeals on the first appeal, court of appeals docket numbers 79-2203 and 79-2104. "II C.A. App." refers to the Joint Appendix filed on the second appeal, court of appeals docket numbers 82-1945 and 82-1961.

2. Respondents sought the grant proposals and contracts awarded under the MKULTRA program and the names of the institutions and individuals that performed research. The CIA made available to respondents all of the grant proposals and contracts. The CIA also contacted the institutions that had performed research, and approximately two-thirds of them voluntarily disclosed their identities to the public. The Agency accordingly disclosed them to respondents. Pet. App. 39a, 73a-74a.

The CIA cited Exemptions 3 and 6 of the FOIA, 5 U.S.C. 552(b)(3) and (6), as the bases for not releasing the names of the other institutions and the individual researchers.[2] Only the Exemption 3 claim

is now at issue. Exemption 3 of the FOIA provides that an agency need not disclose "matters that are * * * specifically exempted from disclosure by statute * * * provided that such statute * * * refers to particular types of matters to be withheld" (5 U.S.C. 552(b)(3)(B)). The statute on which the CIA relied is Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. 403(d)(3). Section 403(d)(3) provides in part:

> [T]he Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure * * *.

3. Respondents then brought this action under the FOIA in the United States District Court for the District of Columbia. See 5 U.S.C. 552(a)(4)(B). They sought to compel disclosure of the names withheld by the CIA. The district court ordered disclosure of these names, apparently reasoning that the term "intelligence sources" in 50 U.S.C. 403(d)(3) did not include the MKULTRA researchers, or if it did, Section 403(d)(3) was not specific enough to qualify as an Exemption 3 statute (see Pet. App. 77a-79a).

The court of appeals vacated the district court's order and remanded for reconsideration (Pet. App. 35a-64a). The court observed that it had consistently held that Section 403(d)(3) "qualifies as a withholding statute under Exemption 3" (*id.* at 44a). The court also noted that in its numerous previous decisions dealing with Exemption 3 and Section 403(d)(3), it had assumed that the phrase "intelligence sources and methods" has "a plain meaning" (*ibid.*). But upon further consideration of the "relevant statutory enactments" (see *id.* at 47a)—which the court identified as the FOIA, the National Security Act of

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[2] The CIA did release these names to congressional committees investigating MKULTRA (see *Project MKULTRA Hearing, supra*, at 8, 13, 49), but it requested that the committees keep the names confidential, and the committees honored the request.

1947, and the Central Intelligence Agency Act of 1949, 50 U.S.C. 403a *et seq.*—the court concluded that the phrase "intelligence sources and methods" is in fact "ambiguous" (Pet. App. 49a) and must be interpreted in a way that reflects "Congress's sensitivity to the need for discrimination in identifying particular types of matters exempted from disclosure" (*id.* at 47a).

The court of appeals acknowledged that the CIA's proposed definition of "intelligence sources"—essentially, individuals or entities that provide intelligence information (see Pet. App. 46a)—was a supportable interpretation of the phrase. But instead of accepting this definition, the court decided that "[a]nalysis should * * * focus on the practical necessity of secrecy * * * [and should] avoid an overbroad discretionary standard" (*id.* at 50a). The court then concluded (*ibid.*):

> [A]n "intelligence source" is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

Judge Markey, in an opinion concurring in part and dissenting in part, urged that the district court's rejection of the Agency's Exemption 3 claim be affirmed but remarked (Pet. App. 62a): "Whatever may be said of the wisdom or morality of the MKULTRA program and its operation, the Agency's need for the research data 'to perform its intelligence function effectively' has not been challenged on this record."

4. On remand, the district court began by explicitly rejecting respondents' contention that the MKULTRA research was not "needed to perform the CIA's intelligence function" (Pet. App. 22a). The court explained (*id.* at 22a-23a): "In view of the agency's concern that potential foreign enemies could be engaged in similar research and the desire to take effective counter-measures, * * * [the Agency] could reasonably determine that this research was needed for its intelligence function." The district court also rejected respondents' contention that some of the researchers were not intelligence sources because they provided "materials or supplies," rather than "information," to the CIA (*id.* at 22a); the court reasoned that "it is irrelevant whether a source tells the CIA how to synthesize a substance or synthesizes the substance itself and sells it to the CIA [because] in either case, what is essentially being provided is information" (*ibid.*).

The district court then turned to the question whether the CIA could show, as the court of appeals' definition requires, that it could not reasonably have expected to obtain the information supplied by the MKULTRA sources without guaranteeing confidentiality to them (Pet. App. 23a). The district court acknowledged that the Agency considered the relationships between it and the MKULTRA researchers to be confidential (*ibid.*). The district court further noted that "[f]or understandable reasons, the Agency wished its interest in this subject matter kept secret, and feared that disclosure would jeopardize its ability to continue its research" (*id.* at 24a). But the district court ruled that this was not sufficient to satisfy the court of appeals' test because "the chief desire for confidentiality was on the part of the

CIA. * * * [C]onfidentiality was normally guaranteed * * * solely to protect the CIA" (*ibid.*). In addition, the court remarked, many MKULTRA projects involved research that "goes on constantly at many places" and therefore "could have been done without a guarantee of confidentiality" (*id.* at 26a).

After reviewing the Agency's submissions about particular cases, the district court found that some of the researchers had sought, and received, express promises of confidentiality from the Agency. The court ruled that the identities of these researchers and the institutions with which they had been associated need not be disclosed (Pet. App. 26a). The district court also exempted other researchers from disclosure for various reasons (*see id.* at 26a-27a, 30a-31a). In total, the court ordered the disclosure of the names of 47 of the researchers and the institutions with which they had been affiliated (*id.* at 21a-34a).

5. Both sides appealed, and a divided panel of the court of appeals reversed the district court's "determination regarding which of the individual researchers satisfy the 'need-for-confidentiality' portion of the definition of 'intelligence source' promulgated in" the court of appeals' earlier opinion. The court affirmed the district court's ruling in other respects. Pet. App. 11a.

The court of appeals peremptorily rejected the Agency's suggestion that it reconsider the portion of the definition requiring the Agency to show that it had to guarantee confidentiality in order to obtain the information supplied by a source (Pet. App. 4a). Instead, the court of appeals criticized the district court for not following this aspect of the definition closely enough. The court of appeals remarked that "the [district] court's attention to questions of this

order was deflected by its interest in whether the agency had, in fact, promised confidentiality to individual researchers" (*id.* at 5a). The court of appeals held that the district court's decision automatically to exempt from disclosure those researchers to whom the CIA had promised confidentiality was erroneous: "Proof that the CIA did or did not make promises of secrecy (either express or tacit) to specific informants * * * [cannot] be dispositive of the question whether a given informant qualifies as an 'intelligence source'" (*id.* at 6a).

Specifically, the court of appeals ruled that even a source of intelligence information who received an express promise of confidentiality would have to be revealed if the source requested such a promise only because he was "unreasonably and atypically leery of providing the agency with innocuous information" (Pet. App. 6a). The court reasoned that "if the agency readily and openly could have obtained, from other sources, data of the sort [such a source] provided, he would not constitute an 'intelligence source'" (*ibid.* (footnote omitted)). The court also remarked that allowing the Agency to refuse to disclose the identities of all sources of intelligence that requested confidentiality could permit "widespread evasion of the letter and spirit of the FOIA" (*id.* at 7a) because it "would [be] * * * easy for the agency" to suggest to intelligence sources "that they sign a form expressing their desire for secrecy" (*id.* at 6a n.7).

Judge Bork wrote a separate opinion, concurring in part and dissenting in part (Pet. App. 12a-16a). He criticized several aspects of the court of appeals' definition of "intelligence sources," urging in particular that there is "no reason to think that section 403(d)(3) was meant to protect sources of information only if secrecy was needed in order to obtain the information." Specifically, Judge Bork explained, "[t]he mere fact that the CIA pursues certain inquiries tells our adversaries much that there is no reason to think Congress intended them to know." He reasoned that "[o]ne need not be an expert in intelligence work to know that it is often possible to deduce what a person is doing, thinking, or planning by knowing what question he is asking or what information he is gathering. That is true even when the answers and information are publicly available." *Id.* at 15a.

Judge Bork also strongly criticized the majority's conclusion that the FOIA sometimes requires the CIA to break a promise of confidentiality it has given to an intelligence source. He stated (Pet. App. 13a-14a):

> Many persons who expect pledges of confidentiality to be honored will be shocked to learn, long after they give information in return for such a promise, that their identities will be disclosed. * * * [I]n this very case, retrospective application of [the majority's definition] * * * may be profoundly unjust. It will certainly be so if it results in the disclosure of the identities of * * * researchers who fully, and justifiably, expected the government to keep its commitment and to protect them from the wide range of dangers that may have concerned them when they insisted on confidentiality. This is not an honorable way for the government of the United States to behave, and the dishonor is in no way lessened because it is mandated by a court of the United States.

Judge Bork urged that by authorizing courts to force the CIA to break its promises of confidentiality,

the majority's approach "produces pernicious results. * * * Because of the ever-present possibility of a future breach of trust ordered by the judiciary under the vague standard laid down today, the CIA will probably lose many future sources of valuable intelligence" (Pet. App. 13a-14a). Judge Bork remarked that under the court of appeals' definition of "intelligence sources," "individuals who give information to the CIA on the understanding that their names will be kept secret cannot rely on the promise of confidentiality if the information turns out to be the sort the CIA can get elsewhere without promising secrecy, something the sources of the information will often not be in a position to know. There is, moreover, no guarantee that a judge, examining the situation years later and deciding on the basis of a restricted record, will come to an accurate conclusion" (*id.* at 13a). Judge Bork then concluded (*ibid.*):

> The CIA and those who cooperate with it need and are entitled to firm rules that can be known in advance rather than vague standards whose application to particular circumstances will always be subject to judicial second-guessing. Our national interest, which is expressed in the authority to keep intelligence sources and methods confidential, requires no less.

The court of appeals denied the CIA's petition for rehearing and suggestion of rehearing en banc. Judges Wilkey, Bork, and Scalia voted in favor of rehearing en banc. Pet. App. 18a.

### SUMMARY OF ARGUMENT

A. The court of appeals' decision is inconsistent with the plain meaning of 50 U.S.C. 403(d)(3), which protects "intelligence sources" from disclosure without limitation or qualification. The district court specifically ruled that the MKULTRA project was within the scope of the Central Intelligence Agency's intelligence function, and the court of appeals did not question that ruling. Thus, the MKULTRA researchers were, literally, sources of intelligence information. That should have been the end of the inquiry.

Nothing in the legislative history of Section 403(d)(3) suggests that the term "intelligence sources" should be given anything other than its plain meaning. On the contrary, the legislative history shows that Congress was aware that the CIA would derive intelligence from a large number of sources, and that these sources would be very diverse in character. Nonetheless, Congress did not attempt to differentiate among sources of intelligence information; it simply protected "intelligence sources" from disclosure. Moreover, Congress was acutely aware of the importance of secrecy to the intelligence-gathering process. Indeed, some of the congressional hearings on Section 403(d)(3) were held in secret and were only recently declassified.

The court of appeals appears to have arrived at its narrow construction of the term "intelligence sources" by interpreting Section 403(d)(3) in a way that would reflect what the court considered to be the pro-disclosure philosophy of the Freedom of Information Act. This is a fundamental error. Exemption 3 of the FOIA incorporates by reference the exemptions from disclosure contained in the statutes to which it refers, and the legislative history of Exemption 3 expressly identifies Section 403(d)(3) as one of the statutes that is incorporated by reference. The disclosure of intelligence sources is therefore governed not by the "spirit" of the FOIA but by Section 403(d)(3)—a statute enacted shortly after World War II in a climate quite different from that which prevailed at the time of the FOIA.

B. In addition, the court of appeals' definition of "intelligence sources" leads to results that Congress could not possibly have intended. In the intelligence area, because the stakes are so high, it is crucially important to the CIA that it be able to give its sensitive intelligence sources as absolute a guarantee of confidentiality as possible, and that it be perceived by potential sources as being able to keep its commitments. "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the *appearance* of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980), quoted in *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (emphasis added). The court of appeals' approach—by requiring the CIA to reveal the identity of a source of intelligence information whenever a court determines, after the fact, that the Agency could have obtained the same kind of information without guaranteeing confidentiality—would necessarily undermine the CIA's efforts to assure potential sources that their identities will not be revealed under circumstances that could cause them great harm.

Moreover, the court of appeals' definition would require the Agency to disclose intelligence sources whenever the information they provide also happens to be in the public domain. This, too, would damage the Agency in a number of ways: by revealing to hostile foreign powers the subjects in which the Agency is interested; by making it difficult for the Agency to obtain information that, while theoretically available to the public, is far more easily obtained from a source that insists on confidentiality; and perhaps by requiring the Agency to disclose the identity of even a very sensitive source, if that source happened also to provide information that the CIA could have obtained without promising confidentiality.

The legislative history of Section 403(d)(3) shows that Congress understood that the Agency would rely heavily on intelligence sources of the kind that the court of appeals' definition would require the Agency to disclose. There is no indication that Congress intended to exclude such sources from the unqualified protection it afforded to "intelligence sources" in Section 403(d)(3). In sum, Congress was aware that intelligence information would be provided by numerous and diverse sources, and it chose to enact an unqualified measure protecting "intelligence sources" from disclosure. There is no reason to give that term anything other than its literal meaning.

## ARGUMENT

### THE FREEDOM OF INFORMATION ACT DOES NOT REQUIRE THE CENTRAL INTELLIGENCE AGENCY TO DISCLOSE THE IDENTITIES OF SOURCES OF INTELLIGENCE-RELATED INFORMATION

#### A. The Term "Intelligence Sources" Should Be Given Its Plain Meaning

In this case, as in another Freedom of Information Act case recently decided by the Court, "[t]he plain language of the statute * * * is sufficient to resolve the question presented" (*United States* v. *Weber Aircraft Corp.*, No. 82-1616 (Mar. 20, 1984), slip op. 6).

1. The only issue in this case is the meaning of the term "intelligence sources" in Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. 403(d)(3). Exemption 3 of the FOIA provides that the FOIA does not require an agency to disclose "matters that are * * * specifically exempted from disclosure by statute * * * provided that such statute * * * refers to particular types of matters to be withheld" (5 U.S.C. 552(b)(3)(B)). It is beyond dispute that Section 403(d)(3) is one of the statutes referred to by Exemption 3; the court of appeals twice acknowledged this "well-established" point (Pet. App. 2a n.1; see *id.* at 44a), and respondents have not contended otherwise.

Indeed, the legislative history of Exemption 3 explicitly identifies Section 403(d)(3) as a principal example of an Exemption 3 statute. See H.R. Rep. 94-880, 94th Cong., 2d Sess., Pt. 2, at 15 n.2 (1976). See also H.R. Rep. 93-1380, 93d Cong., 2d Sess. 12 (1974); S. Rep. 93-854, 93d Cong., 2d Sess. 16 (1974); S. Rep. 98-305, 98th Cong., 1st Sess. 7 n.4 (1983). And the courts of appeals have consistently held that Section 403(d)(3) is an Exemption 3 statute. See, *e.g.*, *Gardels* v. *CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982); *Goland* v. *CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980); *National Commission on Law Enforcement and Social Justice* v. *CIA*, 576 F.2d 1373, 1376 (9th Cir. 1978). Section 403(d)(3) specifically authorizes the Director of Central Intelligence to protect "intelligence sources and methods" from disclosure. It follows that the FOIA does not require the disclosure of the identity of any entity that is an "intelligence source" within the meaning of Section 403(d)(3).

2. a. The court of appeals did not appear to deny that the MKULTRA researchers were, literally, sources of intelligence. The district court specifically ruled that the CIA "could reasonably determine that [the MKULTRA] research was needed for its in-

telligence function" (Pet. App. 22a-23a), and the court of appeals did not question this ruling. Indeed, on the first appeal, Judge Markey, who would have ordered the researchers' identities disclosed without further proceedings, nonetheless acknowledged that "the Agency's need for the research data 'to perform its intelligence function effectively' has not been challenged on this record" (*id.* at 62a).

The MKULTRA researchers were, therefore, "intelligence sources" within the literal meaning of that term. That should have been the end of the inquiry. This Court has frequently emphasized that the plain language of a statute is the surest guide to Congress's intentions (see, *e.g.*, *United States* v. *Rodgers*, No. 83-620 (Apr. 30, 1984), slip op. 4; *Steadman* v. *SEC*, 450 U.S. 91, 97 (1981)), and there is no reason to believe that Congress meant the words of Section 403(d)(3) to have something other than their plain meaning—that all sources of intelligence are protected from disclosure. "Absent a clearly expressed legislative intention to the contrary," the "language of the statute itself" must "ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In this case, there is nothing approaching "the kind of compelling evidence of congressional intent that would be necessary to [warrant] * * * look[ing] beyond the plain statutory language" (*Weber Aircraft Corp.*, slip op. 9).

Congress did not say—as the court of appeals has held—that the Director of Central Intelligence is authorized to protect intelligence sources only if such protection is needed to obtain information that otherwise could not be obtained. Nor did Congress say that only confidential or nonpublic intelligence sources are protected. In other provisions of the FOIA and in the Privacy Act, a related statute, Congress has protected "confidential source[s]," sources of "confidential information," and sources that provided information under an express promise of confidentiality. See 5 U.S.C. 552(b)(7)(D); 5 U.S.C. 552a(k)(2) and (5). But Section 403(d)(3) contains no such language; Congress simply protected all sources of intelligence.

Indeed, as the court of appeals acknowledged in its first opinion in this case, that court's prior decisions dealing with Section 403(d)(3) and Exemption 3 "simply assumed the phrase ['intelligence sources'] to have a plain meaning" (Pet. App. 44a). And in subsequent cases in which the definition it devised in this case had apparently not been brought to its attention, the District of Columbia Circuit has continued to give the term "intelligence sources" its plain meaning. See, *e.g.*, *Afshar* v. *Department of State*, 702 F.2d 1125, 1130 (1983) ("The Freedom of Information Act bars the courts from prying loose from the government even the smallest bit of information that * * * would disclose intelligence sources or methods."); *Gardels*, 689 F.2d at 1104.

b. While the legislative history of Section 403(d)(3) does not specifically address the meaning of the term "intelligence sources and methods"—presumably because Congress did not see any ambiguity in the phrase—it suggests no reason whatever to doubt that Congress intended to give the Director of Central Intelligence broad power to protect the secrecy of the intelligence process. The National Security Act of 1947 was enacted shortly after World War II. Section 403 established the CIA and empowered it, among other things, "to correlate and evaluate intelligence relating to the national security" (50 U.S.C.

403(d)(3)). The legislative history of Section 403 shows that Congress was concerned about reports of shortcomings in American intelligence before Pearl Harbor and during World War II and was determined to improve the nation's capacity to gather and analyze intelligence in peacetime as well as in war. See, *e.g.*, S. Rep. 239, 80th Cong., 1st Sess. 2 (1947); H.R. Rep. 961, 80th Cong., 1st Sess. 3-4 (1947); 93 Cong. Rec. 9444 (1947). See also Commission on Organization of the Executive Branch of the Government, *Intelligence Activities: A Report to the Congress* 29-30 (1955).

At least two aspects of the legislative history shed light on the scope of the protection Congress afforded to "intelligence sources and methods." First, Congress was well aware that the CIA would derive intelligence from a large number of diverse sources. Congress created the CIA because it envisioned that the government would have to collect and analyze a "mass of information" in order to survive in the postwar world. See S. Rep. 239, *supra*, at 2 ("[T]o meet the future with confidence, we must make certain * * * that a central intelligence agency collects and analyzes that mass of information without which the Government cannot either maintain peace or wage war successfully"). See also 93 Cong. Rec. 9397 (1947) (remarks of Rep. Wadsworth) ("The function of that agency is to constitute itself as a gathering point for information coming from all over the world through all kinds of channels."); *National Defense Establishment: Hearings on S. 758 Before the Senate Comm. on Armed Services*, 80th Cong., 1st Sess., Pt. 3, at 669 (1947) (statement of Charles S. Cheston, former military intelligence official) (The agency must have "authority to analyze and correlate information from all sources.") (hereinafter cited as *Senate Hearings*); *National Security Act of 1947: Hearings on H.R. 2319 Before the House Comm. on Expenditures in the Executive Departments*, 80th Cong., 1st Sess. 112 (1947) (remarks of Rep. Boggs) (the Director of Central Intelligence "is dealing with all the information and the evaluation of that information, from wherever we can get it") (hereinafter cited as *House Hearings*); *Senate Hearings*, *supra*, at 132 (statement of Fleet Admiral Nimitz) ("[T]he Central Intelligence Agency [is] charged with responsibility for collection of information from all available sources * * *. [I]ntelligence is a composite of authenticated and evaluated information covering not only the armed forces establishment of a possible enemy, but also his industrial capacity, racial traits, religious beliefs, and other related aspects."); *id.* at 497 (statement of General Vandenberg, Director of Central Intelligence Group) ("Collection in the field of foreign intelligence consists of securing all possible data pertaining to foreign governments or the national defense and security of the United States.").

Congress was also advised of the extraordinary diversity of intelligence sources. The classic secret agent, Congress was told, is only one such source. Allen W. Dulles, an important figure in wartime military intelligence who subsequently became Director of Central Intelligence, explained that "American businessmen and American professors and Americans of all types and descriptions who travel around the world are one of the greatest repositories of intelligence that we have." *National Security Act of 1947: Hearings on H.R. 2319 Before the House Comm. on Expenditures in the Executive Departments*, 80th Cong., 1st Sess. 22 (June 27, 1947) (published 1982) (hereinafter cited as *Secret House*

*Hearings*);[7] see *id.* at 28. Another high-ranking intelligence official emphasized "the great open sources of information * * * such things as books, magazines, technical and scientific surveys, photographs, commercial analyses, newspapers, and radio broadcasts, and general information from people with a knowledge of affairs abroad" (*Senate Hearings*, *supra*, at 492 (statement of General Vandenberg)).

Second, Congress was acutely aware of the importance of secrecy. See *Snepp* v. *United States*, 444 U.S. 507, 512 (1980) ("The continued availability of * * * [intelligence] sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the[ir] personal safety."). Congress was advised in graphic terms, by high-ranking intelligence officials, of the deadly peril that faced intelligence sources whose identities were revealed. See *Secret House Hearings*, *supra*, at 10-11 (statement of General Vandenberg); *id.* at 20 (statement of Allen W. Dulles). And Congress was told that even American citizens who supply intelligence information "close up like a clam" unless they can hold the government "responsible to keep the complete security of the information they turn over" (*Secret House Hearings*, *supra*, at 22 (statement of Allen W. Dulles)).[8] The committees of both Houses went into executive session to consider the proposed legislation; the *Secret House Hearings*, *supra*, were declassified only in 1982. See *id.* at v-viii; S. Rep. 239, *supra*, at 1. A member of the House committee stated on the floor (93 Cong. Rec. 9444 (1947) (statement of Rep. Manasco)):

> We were sworn to secrecy and I hesitate to even discuss this section because I am afraid I might say something, because the Congressional Record is a public record, and divulge some information here that would give aid and comfort to any potential enemy we have * * *. The things we say here today, the language we change, might endanger the lives of some American citizens in the future.

We know of no suggestion in the legislative history that Congress thought the CIA might be *too* secretive.

Against this background, Congress specified that the Director of Central Intelligence is responsible for "protecting intelligence sources and methods from unauthorized disclosure"; that language did not appear in the Administration draft. Compare H.R. 2319, 80th Cong., 1st Sess. § 202 (1947), with H.R. 4214, 80th Cong., 1st Sess. § 105(d)(3) (1947); see H.R. Rep. 961, *supra*, at 3-4.[9] Nothing in this legis-

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[7] The committees of both Houses conducted hearings in executive session. As we note below in text, the executive session hearings of the House committee were only recently declassified and published.

[8] Since the earliest days of the Republic, secrecy has been recognized as vital to the successful gathering of intelligence. In a letter of July 26, 1777, issuing orders for an intelligence mission, George Washington wrote to Colonel Elias Dayton: "The necessity of procuring good intelligence, is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it they are generally defeated * * *." *The Writings of George Washington* 478-479 (J. Fitzpatrick ed. 1933). See also *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

[9] The phrase "protecting intelligence sources and methods" was derived from the Presidential Directive of Jan. 22, 1946 (11 Fed. Reg. 1337), which was incorporated by reference in the Administration bill (H.R. 2319, 80th Cong., 1st Sess. § 202

lative history remotely indicates that Congress intended Section 403(d)(3) or its crucial language—"intelligence sources and methods"—to be construed narrowly or in a way that would promote the disclosure of intelligence sources to the public. Nor is there any basis for concluding that Congress was concerned to restrict the authority of the Director of Central Intelligence to withhold information. Congress was advised that the CIA would draw upon a large and diverse group of intelligence sources; Congress was clearly aware that secrecy was extremely important; and it granted the Director of Central Intelligence unqualified authority to protect the secrecy of sources. Congress plainly intended the Director's authority to have the broadest scope.

3. The court of appeals appeared to proceed from the premise that the term "intelligence sources" must be given a narrow meaning in order to avoid "broad agency discretion" (Pet. App. 45a; see *id.* at 50a) and thereby to serve what the court of appeals considered to be the pro-disclosure "spirit" of the FOIA (see, *e.g.*, *id.* at 7a, 42a; see also *id.* at 41a-45a, 47a, 50a). This approach is fundamentally misconceived. The disclosure of intelligence sources is governed by Section 403(d)(3), not by the substantive standards or "spirit" of the FOIA.

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(1947)). This derivation scarcely suggests a narrow construction; the directive was issued by President Truman shortly after the war to establish the National Intelligence Agency and the Central Intelligence Group and to charge these predecessors of the CIA with "assur[ing] the most effective accomplishment of the intelligence mission related to the national security" (11 Fed. Reg. 1337 (1946)). They were accordingly made "responsible for fully protecting intelligence sources and methods" (*id.* at 1339).

The purpose of Exemption 3 is to make it clear that the FOIA does not repeal by implication certain other statutes. See H.R. Rep. 1497, 89th Cong., 2d Sess. 10 (1966). As we noted, it is beyond dispute that Section 403(d)(3) is one of the statutes identified by Exemption 3. The legislative history is explicit that Exemption 3 "*incorporat[es] by reference* exemptions contained in [the] * * * statutes" it identifies. H.R. Conf. Rep. 94-1441, 94th Cong., 2d Sess. 14 (1976) (emphasis added); see *id.* at 25.[*] Thus, the only question in this case is the interpretation of the term "intelligence sources and methods" in Section 403(d)(3). The supposed pro-disclosure philosophy of the FOIA is quite irrelevant to that question; as we have shown, Section 403(d)(3) was enacted in a climate far different from that which prevailed at the time the FOIA was enacted. The court of appeals' anachronistic attempt to impute its own skepticism about CIA secrecy (a skepticism it also attributed to the Congress that enacted the FOIA) to the post-war Congress that established the Agency appears to be the fundamental error that led to its wholly unjustifiable definition of "intelligence sources."

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[*] That is also how this Court has interpreted Exemption 3. In *Baldrige* v. *Shapiro*, 455 U.S. 345 (1982), the Court first considered whether 13 U.S.C. 8(b) and 9(a) were Exemption 3 statutes (455 U.S. at 354-355); *after* determining that they were, the Court turned to the language and legislative history of those provisions and did not further consider the FOIA (*id.* at 355-359).

Similarly, in *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, *supra*, the Court, upon determining that 15 U.S.C. 2055(b)(1) was an Exemption 3 statute, had no difficulty holding that the time limits governing disclosure under that statute—not the more restrictive time limits of the FOIA—would control whenever a request for information covered by Section 2055(b)(1) was made. See 447 U.S. at 121-122. As this holding reflects, once a statute is determined to be an Exemption 3 statute, the entire regime it establishes to govern disclosures—its time limits, its substantive criteria, and its "spirit"—supersedes the standards found in the FOIA.

The court of appeals offered other justifications for narrowing the explicit protection afforded to intelligence sources by Section 403(d)(3), but none of them is any more substantial. For example, the court relied on a provision of the Central Intelligence Agency Act of 1949, 50 U.S.C. 403g, which provides in part:

> In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of [5 U.S.C. (1958 ed.) 654[illegible]] and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency.

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[illegible] This statute required the Civil Service Commission to compile an Official Register of the United States, "which shall contain a full and complete list of all persons occupying administrative and supervisory positions in the legislative, executive, and judicial branches of the Government * * *. The register shall show the name; official title; salary, compensation, and emoluments; legal residence and place of employment for each person listed therein * * *." This provision was repealed by the Act of July 12, 1960, Pub. L. No. 86-626, § 101, 74 Stat. 427.

The court of appeals stated that "Section 403g provides specific protection for most of the CIA activities and contractual relationships about which the Agency has expressed greatest concern * * * [and] evinces a congressional awareness that Section 403(d)(3) * * * would require construction and interpretation limiting executive discretion to withhold; otherwise it would have felt no need to 'implement' the original proviso by listing the specific matters exempted from disclosure under Section 403g." Pet. App. 49a-50a.

This reasoning is erroneous in many ways. Section 403g does not in fact protect "most of the CIA activities * * * about which the Agency has expressed greatest concern." Section 403g applies only to "personnel employed by" the CIA, and many important intelligence sources might not be regarded as personnel employed by the CIA; one example is Americans travelling abroad, who, Director Dulles advised Congress, "are one of the greatest repositories of intelligence that we have" (*Secret House Hearings*, *supra*, at 22). Other sources, as well, furnish information simply because they wish to aid the Agency or the United States. But the extent to which Section 403g protects intelligence sources is, in any event, irrelevant. Congress enacted both Section 403(d)(3) and Section 403g, and it cannot be seriously disputed that both Section 403g and Section 403(d)(3) are included within Exemption 3. See page 15, *supra*; *National Commission*, 576 F.2d at 1376. Section 403(d)(3) should not be given an artificially narrow interpretation that finds no support in its language or legislative history merely because Section 403g also exists to protect what Congress described as "the confidential nature of the

Agency's functions" (H.R. Rep. 160, 81st Cong., 1st Sess. 6-7 (1949); see S. Rep. 106, 81st Cong., 1st Sess. 1 (1949)). See also *Baker* v. *CIA*, 580 F.2d 664, 667-669 (D.C. Cir. 1978). Cf. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 468 (1969).

The court of appeals' suggestion that the enactment of Section 403g reveals Congress's awareness that Section 403(d)(3) "require[s] construction and interpretation limiting executive discretion to withhold" (Pet. App. 49a-50a) is similarly a non sequitur. The court of appeals would read Section 403g as if it superseded, narrowed, or exhausted the content of Section 403(d)(3), but what Section 403g says is that it "further * * * implement[s]" Section 403 (d)(3). The most likely explanation of Congress's decision to enact Section 403g is that in 1949, there were other statutes that might have been construed to require the disclosure of information about CIA employees—5 U.S.C. (1958 ed.) 654, which is mentioned in Section 403g but has since been repealed, was apparently the statute Congress had in mind (see page 24 note 7, *supra*)—and Congress thought it advisable explicitly to exempt the Agency from such statutes. But before the FOIA was enacted, there was no statute that could have been thought to require the disclosure of intelligence sources generally. When Congress enacted the FOIA, it included Exemption 3 and, as we noted, specified that Section 403(d)(3) is an Exemption 3 statute. Nothing in this pattern of congressional activity suggests that the protection that Exemption 3 and Section 403 (d)(3) afford to intelligence sources should be given less than its full, literal meaning.[8]

Finally, the court of appeals stated that its definition of "intelligence sources" was justified because when Congress enacted Section 403(d)(3), "[s]ecrecy seems to have been a concern only insofar as it was pertinent to protection of the national security. Analysis should therefore focus on the practical necessity of secrecy. * * * Section 403(d)(3) must be interpreted in functional terms" (Pet. App. 50a). As we will explain, the court of appeals' definition of intelligence sources reveals that the court was ill-informed about the ways in which secrecy is "functional" in the intelligence area and the reasons that secrecy can be a "practical necessity." See pages 29-41, *infra*. But the more fundamental point is that Congress has already determined the extent to which secrecy is a "practical necessity" and is "pertinent to protection of the national security"; Congress's judgment is reflected in its unqualified mandate to the Director to "protect[] intelligence sources and methods from unauthorized disclosure." It was not open to the court of appeals to second-guess Congress by deciding that it is only *sometimes* necessary to protect intelligence sources from disclosure.

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[8] The court of appeals also stated (Pet. App. 49a; see also *id.* at 11a n.13) that the existence of Exemption 1 of the FOIA, 5 U.S.C. 552(b)(1), which applies to properly classified documents, warrants a narrowed interpretation of Section 403(d)(3). (The identities of the MKULTRA researchers are not classified.) This approach is inconsistent even with prior precedent in the District of Columbia Circuit. See *Gardels*, 689 F.2d at 1107. It is true that the identities of intelligence sources will frequently be classified information, but that does not affect the interpretation of the independent exemption provided by Exemption 3 and Section 403(d)(3); as this Court has recently ruled, the interpretation of an FOIA exemption should not be distorted because a different exemption may also apply to some of the same documents. See *FBI* v. *Abramson*, 456 U.S. 615, 629-630 (1982). See also pages 2-4 of the Reply Brief for the Petitioners filed in support of the petition for a writ of certiorari.

4. Contrary to some of the suggestions made by respondents and the court of appeals (see, *e.g.*, Memo. in Opp. 5, 9, 10-12; Pet. App. 45a, 47a, 50a), interpreting Section 403(d)(3) according to its plain meaning will not give the CIA unlimited authority to withhold documents requested under the FOIA. The CIA may engage only in authorized intelligence activities. See 50 U.S.C. 403(d); Exec. Order No. 12,333, Section 1.51, 46 Fed. Reg. 59941, 59944 (1981). Moreover, the Agency's intelligence-gathering operations are subject to a number of statutory restrictions. See 50 U.S.C. 403(d)(3) ("[T]he Agency shall have no police, subp[o]ena, law-enforcement powers, or internal-security functions.").

This case, however, does not now involve any dispute over the meaning of the term "intelligence" or the breadth of the Agency's intelligence function.[*] As we have noted, the district court ruled that the Agency "could reasonably determine that [the MKULTRA] research was needed for its intelligence function" (Pet. App. 22a-23a), and the court of appeals did not disturb that ruling. The only question, therefore, is whether Section 403(d)(3) protects from disclosure a "source" of information that is acknowledged to be necessary for the Agency's "intelligence" function. That question is answered by the plain language of the statute.

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[*] Of course, the Agency's determination that a particular person or entity is a source of intelligence information should be accorded great deference by a reviewing court (see, *e.g.*, *Halperin* v. *CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980); *Gardels*, 689 F.2d at 1104-1105), and, as Judge Bork noted, the court should not be permitted to substitute its judgment for that of the Director in the exercise of his sound discretion (see Pet. App. 15a-16a).

### B. The Court of Appeals' Definition of "Intelligence Sources" Produces Results That Congress Could Not Have Intended

The severe difficulties that would be created if the court of appeals' definition of "intelligence sources" were routinely applied in FOIA cases are a further reason for interpreting that term according to its plain meaning. The court of appeals' definition would require disclosures that could be extremely damaging to the CIA's ability to carry out its mission, and Congress could not have intended to permit such disclosures. Indeed, there is specific evidence in the legislative history of Section 403(d)(3) that Congress intended to preclude many of the kinds of disclosures that would be required by the court of appeals' decision.

But the fact that the court of appeals' definition of "intelligence sources" leads to results that are obviously inconsistent with Congress's intentions is not just an indictment of that court's particular fomulation; it is a further illustration of why Congress chose to give unqualified protection to "intelligence sources and methods." The court of appeals, notwithstanding its concern with the "practical necessity of secrecy" and its effort to devise a "functional" definition, did not recognize that its definition produces wholly unacceptable results when applied to many categories of intelligence sources. Nor did the court of appeals fully understand the manifold and complex ways in which secrecy is vital to intelligence gathering. Congress protected "intelligence sources and methods" without qualification, and the profound shortcomings of the court of appeals' definition suggest that a narrower protection can risk interfering with the intelligence-gathering mission of the CIA in important ways that are not always apparent.

1. The court of appeals grievously underestimated the importance of providing intelligence sources with an assurance of confidentiality that is as absolute as possible. Under the court of appeals' approach, the CIA will be forced to disclose an intelligence source whenever a court determines, after the fact, that the Agency could have obtained the kind of information supplied by the source without promising confidentiality. Indeed, the court of appeals carried this approach to the point of holding that the Agency will be required to betray an explicit promise of confidentiality if a court determines that the promise was not necessary—or, in the court of appeals' words, if a court decides that the intelligence source to whom the promise was given was "unreasonably and atypically leery" of cooperating with the CIA (Pet. App. 6a).[19]

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[19] The court of appeals' ruling that the Agency will sometimes be required to betray explicit promises of confidentiality is extraordinary. "Great nations, like great men, should keep their word." *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting), quoted in *Heckler* v. *Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 19.

In a sense, however, the court of appeals' requirement that the Agency must be prepared to breach explicit promises of confidentiality is only the tip of the iceberg; it reflects the deeper misconceptions of the court of appeals' approach. The assurance of confidentiality given to an intelligence source is seldom recorded in writing, and often it is not even explicit. It is usually so obvious to all concerned that the source wants to remain confidential that no explicit understanding is needed; an assurance of confidentiality is implicit in the relationship between the Agency and the source. See J.A. 17,

Few things will have as devastating an impact on the CIA's ability to carry out its mission as forced disclosure of the identities of its sources. "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the *appearance* of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp*, 444 U.S. at 509 n.3, quoted in *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (emphasis added). If potential intelligence sources begin to perceive that the Agency will be unable to maintain the confidentiality of its relationship to them, many can be expected to refuse to supply information to the Agency in the first place.

This will be true no matter how rational or well-founded their perception is. As this Court has recognized in both the intelligence area and other contexts, what is crucial is not just whether the government has in fact betrayed a confidence but "the *appearance* that confidentiality ha[s] been breached" or might be breached (*Baldrige* v. *Shapiro*, 455 U.S. 345, 361 n.17 (1982) (emphasis in original)). "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all"

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25-26 (affidavit of M. Corley Wonus). *Cf. Londrigan* v. *FBI*, 722 F.2d 840, 844-845 (D.C. Cir. 1983).

Indeed, an experienced CIA operations officer explained, in an affidavit submitted in this case, that many sources would refuse to memorialize an agreement of confidentiality because doing so would create an additional document, linking them with the CIA, that might fall into the wrong hands. See J.A. 43 (affidavit of Louis J. Dube). For these reasons, the practical damage caused by the court of appeals' definition would not be greatly reduced even if it were amended so as to require courts to honor fully explicit promises of confidentiality.

(*Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981)). Certainty is especially vital in the intelligence area, where the risks are enormous: if an intelligence source's cooperation becomes known—indeed, even if it is revealed that he cooperated with the CIA in some apparently innocuous way—he may face not only great embarrassment but far more severe consequences. See *Haig* v. *Agee*, 453 U.S. at 285 & n.7; J.A. 44-46 (affidavit of Louis J. Dube).

Consequently, even if there is only a relatively small probability that a court will order disclosure of a source's identity, that will be of little comfort to the source. In order to induce him to cooperate, the CIA will have to provide as absolute an assurance of confidentiality as it possibly can. "The continued availability of * * * [intelligence] sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even danger [their] personal safety" (*Snepp*, 444 U.S. at 512). See also J.A. 20-21. Cf. *Weber Aircraft Corp.*, slip op. 10-11 n.23; *Williams* v. *FBI*, 730 F.2d 882, 885-886 (2d Cir. 1984).

Nor will it reassure a potential intelligence source to learn that a court will order his identity revealed only after examining the facts of the case and determining that he was "atypically or unreasonably leery," that the Agency could have obtained the same information from another source without guaranteeing confidentiality,[illegible] or that some similar standard was met. An intelligence source will "not be concerned with the underlying rationale for disclosure

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[illegible] There is, of course, no reason to believe that courts generally have the expertise needed to determine whether the Agency would have been able to obtain certain information without promising confidentiality to a source.

of" his cooperation with the CIA if his cooperation was secured "under assurances of confidentiality" (*Baldrige*, 455 U.S. at 361). Moreover, a court's decision whether an intelligence source will be harmed if his identity is revealed will often require complex political, historical, and psychological judgments, sometimes about societies very different from our own.[illegible] There is no reason for anyone—especially a potential intelligence source whose life may be at stake—to have great confidence in a court's ability to make those judgments correctly. Indeed, many potential intelligence sources, especially those who are not American citizens, are likely to perceive courts as unpredictable institutions that are influenced by concerns that have little in common with the world in which the potential source and his CIA contact must operate. A potential source is also likely to

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[illegible] In *Fitzgibbon* v. *CIA*, 578 F. Supp. 704 (D.D.C. 1983), motion for reconsideration pending, for example, a district court applying the court of appeals' definition of "intelligence sources" has ordered the disclosure of CIA sources in the Dominican Republic on the basis of judgments such as these: only the Trujillo regime, which has been deposed, would have taken action against these sources (*id.* at 719 n.50); the current regime is "stable" and "has disavowed all ties with Trujillo's politics, attitudes and methods" (*ibid.*); since Trujillo and his police chief are dead, the sources need not fear retaliation from individuals sympathetic to Trujillo (*id.* at 720 n.60); and indeed "[m]any of the sources * * * far from being embarrassed by revelation, might well be thought to be popular, particularly in the Dominican Republic, for having helped, no matter how slightly, to work against a dictator now unpopular and scorned" (*id.* at 721 n.61).

Leading experts on the politics and culture of a society are likely to differ on the extent to which generalizations like these are accurate. Plainly a court should not be in a position of having to make such judgments.

realize that a court's decision whether to reveal his cooperation with the agency may occur well in the future, at a time when the source's concern for confidentiality may seem less understandable to everyone except the source himself. See also Pet. App. 92a (affidavit of Director of Central Intelligence Turner) ("[A] unilateral breach of confidentiality and trust by the United States Government will be viewed as an arrogant disregard for the lives or safety or reputations of those who have contributed to our intelligence activities.").

2. The court of appeals also failed to recognize that when Congress protected "intelligence sources" from disclosure, it was not simply protecting sources of secret intelligence information; as we have noted, Congress was aware that secret agents are not the most typical intelligence sources. Many important sources provide the Agency with information that members of the public could, at least in theory, also obtain. But under the court of appeals' definition of "intelligence sources," the Agency cannot withhold the identity of a source of intelligence information if that information is also publicly available, because the Agency can obtain such information without guaranteeing confidentiality. This approach is divorced from the realities of intelligence work and is demonstrably inconsistent with Congress's understanding of the purposes of Section 403(d)(3).

First, as Judge Bork explained, another government can learn a great deal about "what subjects [are] of interest to the CIA" by examining the public sources of information that the Agency is exploiting: "One need not be an expert in intelligence work to know that it is often possible to deduce what a person is doing, thinking, or planning by knowing what question he is asking or what information he

is gathering. That is true even when the answers and information are publicly available. The mere fact that the CIA pursues certain inquiries tells our adversaries much that there is no reason to think Congress intended them to know." Pet. App. 15a.

The facts of this case themselves suggest an example. When the CIA decided to investigate "brainwashing" and the countermeasures that might be taken, it might have turned to sources, such as journals and ongoing research projects, that are available to the public. But a foreign government that learned the sources that the Agency was consulting would have been able to infer both the general nature of the CIA's project and the directions that its inquiry was taking. See Pet. App. 89a-90a (affidavit of Director of Central Intelligence Turner) ("Throughout the course of the Project, CIA involvement or association with the research was concealed in order to avoid stimulating the interest of hostile countries in the same research areas.").[20]

Similarly, the court of appeals, in its first opinion, suggested that the excessive breadth of the CIA's proposed definition of "intelligence sources" was revealed by the Agency's acknowledgment that its definition would "apply even to periodicals—including *Pravda* and the *New York Times*—from which [the Agency] culls information that informs its view of foreign nations and their policy intentions" (Pet. App. 46a (footnote omitted)). But the disclosure that the CIA consults *Pravda* and the *New York Times* is innocuous not because those periodicals are publicly available but because it is the disclosure of a fact—the fact that the Agency consults these newspapers—that is already commonly assumed to be true. An obscure Eastern European technical journal might also be available to members of the public; but disclosure of the fact that the CIA subscribes to that journal could easily thwart the CIA's efforts to exploit its value as an intelligence source.

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[20] For example, the district court discussed several MKULTRA subprojects involving various kinds of scientific research (Pet. App. 25a-26a) and concluded that the CIA was required to disclose the persons who conducted this research because "[i]t seems clear that such research, which goes on constantly at many places, could have been done without a guarantee of confidentiality" (*id.* at 26a). The court of appeals specifically approved this reasoning as a correct application of its definition of "intelligence sources." *Id.* at 5a. It appears that neither court considered the possibility that a foreign power might have been interested in learning that the CIA was conducting research in these areas.

In addition, much information that is publicly available in principle can be difficult to obtain from public sources, and far more easily obtained from sources whose identity both the source and the Agency might legitimately wish to protect. An example of such information might be details of the travel plans or financial transactions of an individual whom the CIA is observing. Such information is theoretically in the public domain, but as a practical matter the Agency may have to obtain it from a source who would cease to provide it if his identity were revealed. The court of appeals would apparently require the disclosure of such a source's identity—since the information was available by means that did not involve a guarantee of confidentiality—thereby impairing the Agency's ability to recruit such sources in the future.

Finally, the court of appeals apparently failed to recognize that many intelligence sources will provide the CIA with both highly sensitive information—of a kind that would never be supplied without a promise of confidentiality—and public or "innocuous" information that the Agency could have obtained elsewhere without guaranteeing secrecy. For example, a source in a foreign nation might supply, in addition to much sensitive information, a report of a crop failure that American journalists also learned about and reported in newspapers. If an FOIA request were then filed for all sources of information about the crop failure, the court of appeals' definition might be interpreted to require the Agency to disclose its relationship with the sensitive foreign source—even though that disclosure would be likely to damage both the Agency and the source.[26]

In these respects, as well, the court of appeals' definition is harmful not only because it will force certain disclosures but because of the prospective effect it will have on the CIA's operations. If the Agency knows that it will be required to reveal its sources of public information in response to a proper FOIA request, it can be expected to alter its techniques so as to reduce the damage that such a disclosure might cause. In this way, the court of appeals' failure simply to protect all "intelligence sources" would force the CIA to depart from what it considers the best use of intelligence sources out of concern that some of those sources might become public.

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[26] A district court applying the court of appeals' definition has recently interpreted it in precisely this way (*Fitzgibbon v. CIA*, 578 F. Supp. 704, 716 n.25 (D.D.C. 1983), motion for reconsideration pending):

> Under [the court of appeals' definition], a document reporting on a conversation between a CIA agent and a source on a wholly innocuous subject would not be protected even if the source is a highly placed official of a government hostile to the United States. Because of its innocuousness, the information presumably could have been obtained from any number of individuals without a promise of confidentiality * * *.

We do not acquiesce in this interpretation of the court of appeals' opinion—the district court in this case, for example, apparently did not interpret the court of appeals' opinion in this way (see Pet. App. 26a)—but the opinion is susceptible of such a reading. Obviously, even a possibility that such disclosures might occur would seriously damage the government's ability to gather intelligence.

The legislative history of Section 403(d)(3) confirms what is obvious in any event—that Congress would never have countenanced the results that the court of appeals' approach produces. As we have noted, Congress was specifically made aware that many—indeed most—"intelligence sources" provide information that is, at least in principle, publicly available; nonetheless, Congress gave no indication that it intended to exclude such sources from the protection of Section 403(d)(3). For example, General Vandenberg, who had been Director of the Central Intelligence Group, the CIA's predecessor (see 11 Fed. Reg. 1337 (1946); pages 21-22 note 5, *supra*), explained to Congress that "roughly 80 percent of intelligence should normally be based" on "the great open sources of information * * * such things as books, magazines, technical and scientific surveys, photographs, commercial analyses, newspapers, and radio broadcasts, and general information from people with a knowledge of affairs abroad." *Senate Hearings*, *supra*, at 492. Indeed, General Vandenberg asserted that this kind of intelligence had been neglected before World War II and urged that it be a principal concern of the post-war agency (*ibid.*). Essentially the same points were made by Director Dulles. See *id.* at 526; *Secret House Hearings*, *supra*, at 22.

Thus, when Congress gave the Director of Central Intelligence unequivocal authority to "protect[] intelligence sources and methods from unauthorized disclosure," it had previously been informed by the Director's predecessor and the future Director that the great preponderance of intelligence sources would be public sources. In these circumstances, Congress must have intended the Director's authority to extend to public sources.

Similarly, Admiral Inglis, then Chief of Naval Intelligence, testified that intelligence agents in foreign countries are often used to "confirm or not what we have deduced from * * * Russian propaganda broadcasts" (*Secret House Hearings*, *supra*, at 63). Congress, therefore, unlike the court of appeals, was aware that highly secret intelligence sources will sometimes also report information that the CIA can obtain, or has obtained, from open sources. It is inconceivable that Congress, after having received Admiral Inglis's testimony, would have decided to deny the Director of Central Intelligence the authority to protect sources who function in this way.[18]

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[18] Moreover, the CIA obtains much valuable intelligence from unwitting sources—sources who reveal information to a person who is, unbeknownst to the source, a CIA contact. A CIA operational officer filed an affidavit in this case in which he used real examples to explain how such sources are used (J.A. 47-48):

> (a) [Some] [i]ntelligence sources * * * do not realize they are intelligence sources. Such a source might, for example, be a foreign official who regularly discusses official business problems and concerns in candid terms with an old and trusted confidant who repeats such information to the CIA. If the original source in such circumstances [learned that he was a source as the result] * * * of an FOIA request, the relationship between

3. In sum, as Congress knew when it enacted Section 403(d)(3) in 1947, intelligence sources can take a variety of forms: the secret agent; a cooperative foreign citizen or an American travelling abroad; an unwitting source who does not realize he is conveying information to the CIA and would stop conveying it if he did; or a publicly available periodical or radio broadcast. And Congress was aware that these sources could provide many different kinds of information, ranging from the most sensitive secrets to apparently innocuous facts from which Agency experts might derive an important lead.

---

> the source and his confidant would obviously be destroyed. A useful intelligence source would likely refuse to provide any additional information and the intermediary would probably suffer some form of retaliation for having betrayed the source's trust.
>
> (b) [Some] [i]ntelligence sources * * * do not know they are reporting to the CIA. In such a case, the intelligence source might be knowledgeable of the plans and activities of a terrorist group or a narcotics smuggling ring of which he was a member. He might, in fact, believe he was reporting to an individual who was intent upon negating the efforts of CIA to learn of the plans and activities of such organizations. Should an FOIA request [cause] * * * the source [to learn of his status] * * *, this source would obviously cease providing information. No doubt the intermediary who had passed the information along to CIA would suffer severe consequences.
>
> * * * * *
>
> Such circumstances described above * * * are neither imaginary nor uncommon * * *.

It is unclear how the court of appeals' definition should apply to unwitting sources; the district court ruled that unwitting sources necessarily cannot be kept confidential by the CIA. See Pet. App. 24a ("[T]he fact that the CIA has maintained that even the names of the unwitting researchers must remain undisclosed impeaches its contentions with respect to those researchers who were witting of CIA involvement.").

Secrecy is important in each of these contexts. Not only is secrecy necessary to protect a source supplying sensitive information; the Agency must also protect its reputation for being able to guarantee confidentiality to potential sources. In addition, the CIA must ensure that it can continue to exploit unwitting sources; and in the case of public sources of information, secrecy is important to avoid revealing to observers the subjects in which the Agency is interested.

Congress, acting in light of these complex realities of intelligence gathering, did not attempt to delineate the categories of intelligence sources or information that were to remain confidential. It simply gave the Director of Central Intelligence unqualified authority to "protect[] intelligence sources and methods from unauthorized disclosure." There is no indication that Congress intended these terms to have anything other than their literal meaning. Accordingly, the court of appeals erred when it attempted to devise a narrower definition.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

Rex E. Lee
*Solicitor General*

Richard K. Willard
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*Deputy Solicitor General*

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*General Counsel*

Edward Page Moffett
*Attorney*
*Central Intelligence Agency*

June 1984

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## APPENDIX

## STATUTORY PROVISIONS INVOLVED

1. The Freedom of Information Act, 5 U.S.C. 552, provides in part:

* * * * *

> [(a)(4)] (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.
>
> * * * * *
>
> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> * * * * *

2. Section 102 of the National Security Act of 1947, 50 U.S.C. 403, provides in part:

* * * * *

> **(d) Powers and duties**
>
> For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Agency, under the direction of the National Security Council—
>
>> (1) to advise the National Security Council in matters concerning such intelligence activities of the Government departments and agencies as relate to national security;
>>
>> (2) to make recommendations to the National Security Council for the coordination of such intelligence activities of the departments and agencies of the Government as relate to the national security;
>>
>> (3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: *Provided*, That the Agency shall have no police, subp[o]ena, law-enforcement powers, or internal-security functions: *Provided further*, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence: *And provided further*, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;

>> (4) to perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the National Security Council determines can be more efficiently accomplished centrally;
>>
>> (5) to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.

3. Section 6 of the Central Intelligence Agency Act of 1949, 50 U.S.C. 403g, provides in part:

> In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of sections 1 and 2 of the Act of August 28, 1935 (49 Stat. 956, 957; 5 U.S.C. 654), and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency: *Provided*, That in furtherance of this section, the Director of the Office of Management and Budget shall make no reports to the Congress in connection with the Agency under section 607 of the Act of June 30, 1945, as amended (5 U.S.C. 947(b)).

[illegible]

# JOINT
# APPENDIX

Office - Supreme Court, U.S.
FILED
JUN 29 1984
ALEXANDER L. STEVAS
CLERK

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No. 83-1075

# In the Supreme Court of the United States

OCTOBER TERM, 1983

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CENTRAL INTELLIGENCE AGENCY
AND WILLIAM J. CASEY,
DIRECTOR OF CENTRAL INTELLIGENCE, PETITIONERS

*v.*

JOHN CARY SIMS
AND SIDNEY M. WOLFE

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## JOINT APPENDIX

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---

**PETITION FOR WRIT OF CERTIORARI**
**FILED DECEMBER 29, 1983**
**CERTIORARI GRANTED MARCH 5, 1984**

67pp

BEST AVAILABLE COPY

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251

JOHN CARY SIMS, ET AL., PLAINTIFFS

*v.*

CENTRAL INTELLIGENCE AGENCY, DEFENDANT

| *Date* | *Proceedings* |
|---|---|
| **1978** | |
| **Nov 30** | COMPLAINT. |
| **Nov 30** | Summons (4) & copies (4) of complaint issued. U.S. Atty. ser 12-5-78; defts ser 12-7-78. |
| **Nov 30** | INTERROGATORIES of pltfs to defts. |
| **1979** | |
| **Jan 04** | ANSWER of defts to complaint. |
| **Feb 26** | ANSWER of defts to first set of interrogatories; exhibit A. |
| **Mar 01** | MOTION of defts to dismiss & for summary judgment; statement of material facts; P&A; exhibits 1, A-L. |
| **Mar 21** | CROSS-motion of pltfs. for summary judgment; statement of material facts about which there is no genuine issue; P&A; table of contents; exhibits A-C. |
| **Apr 02** | MEMORANDUM of defts. of P&A in opposition to cross-motion of pltf for summary judgment; affidavit of Emile L. Julian; statement of genuine issues. |
| **Apr 05** | REPLY of pltfs. to opposition of defts to motion for summary judgment. |
| **Apr 06** | CROSS-motions for summary judgment, argued & taken under advisement. (Rep: B. Abramowitz) OBERDORFER, J. |
| **Apr 17** | MEMORANDUM filed 4-12-79. (N) OBERDORFER, J. |

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| Apr 17 | ORDER filed 4-12-79 directing parties to submit certain memos by 4-30-79. (N) OBERDORFER, J. |
| Apr 25 | MEMORANDUM filed 4-24-79. (N) OBERDORFER, J. |
| May 14 | MEMORANDUM of pltfs. in response to court's order of 4-12-79. |
| May 14 | RESPONSE of defts. to court's order of 4-12-79 & supplemental memo in support of their motion to dismiss & for summary judgment; affidavit of Stansfield Turner. |
| May 18 | NOTICE by defts. of omission of attachments re their response to court's order of 4-12-79 filed 5-14-79; attachments (2). |
| May 25 | SUPPLEMENTAL memo of pltfs. in response to Court's order of 4-12-79. |
| Aug 07 | MEMORANDUM and attachment. (N) OBERDORFER, J. |
| Aug 07 | ORDER directing defts. to disclose names of all participants in MK-ULTRA project; deferring disclosure until 10-1-79; allowing deft. until 10-1-79 to submit list of participants *in camera* and a public affidavit. (N) OBERDORFER, J. |
| Aug 13 | SUPPLEMENTAL memorandum directing deft. to submit in camera list by October 1, 1979 (N) OBERDORFER, J. |
| Aug 31 | MEMORANDUM. (N) OBERDORFER, J. |
| Sept 17 | MOTION by deft. to vacate; P&A's. |
| Sept 17 | MEMORANDUM by pltfs. in response to the Court's request for comments on Irons and Sears v. Dann. |
| Sept 17 | MEMORANDUM by defts. to the Court in response to memorandum of 9-31-79. |
| Sept 21 | ORDER filed 9-20-79 scheduling hearing on 9-27-79, 10:00 AM (n) OBERDORFER, J. |
| Sept 21 | MEMORANDUM of pltfs. in opposition to motion to vacate & in response to memo of defts. commenting on Irons & Sears *v.* Dann. |

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| Sept 27 | HEARING on motions argued & taken under advisement. (Rep: L. Lacorte) OBERDORFER, J. |
| Sept 28 | ORDER filed 9-27-79 denying motion of defts. to vacate; treating defts. answer as a motion to dismiss against Admiral Stansfield Turner & granting; & modifying order of 4-12-79. (N) OBERDORFER, J. |
| Oct 01 | MOTION of deft. for a stay; P&A. |
| Oct 05 | ORDER filed 10-2-79 granting motion of deft. for stay of order of 8-7-79 that required disclosure pending appeal. (N) OBERDORFER, J. |
| Oct 05 | NOTICE of appeal by defts. from order entered 8-7-79 & order entered 9-28-79. Copy mailed to Paul A. Levy, Esq. Govt.—no fee. Copies of notice of appeal & docket entries transmitted to USCA. Receipt acknowledged (79-2208) |
| Nov 14 | RECORD on appeal delivered to USCA. Receipt acknowledged (79-2208) |
| Nov 20 | MOTION of pltfs. for issuance of a final order. |
| Nov 28 | RESPONSE of deft. to motion of pltfs. for issuance of a final order. |
| Nov 30 | ORDER directing deft. to make disclosure by 1-30-80 & in event of appeal staying order until return of mandate. (N) OBERDORFER, J. |
| Dec. 27 | NOTICE of Appeal by deft. from order of Nov. 30, 1979. Copy mailed to Paul A. Levy, Esq. Govt.-No fee. |
| Dec. 27 | COPIES of Notice of Appeal and docket entries transmitted to U.S.C.A. No. 79-2554. |
| 1980 | |
| Jan 24 | RECORD on appeal delivered to USCA. Receipt acknowledged. |
| Nov 13 | INTERROGATORIES by pltf. to deft. |
| Nov 26 | CERTIFIED COPY of Judgment from USCA dated 09-29-80, affirming judgment in part and vacating in part; cases remanded to USDC for further act not inconsistent with the opinion of this Court; opinion. |

| | |
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| 16 | STATUS CALL, Deft. to start answering interrogatories and report to Court every month on progress; additional status call on 2-13-81 at 9:30A.M. (Rep: Bruce Herzfeld) OBERDORFER, J. |
| 12 | ORDER filed 1-8-81, directing deft, to file status reports 1-6-81 and 2-9-81 and status conference 2-9-80 at 9:30 AM OBERDORFER, J. |
| 16 | REPORT by deft. to the Court. |
| 09 | REPORT by deft. to the Court. |
| 13 | STATUS CALL: Deft. to respond to interrogatories by 3-4-81; status call 3-13-81 at 2:00 P.M. Rep: Bruce Herzfeld OBERDORFER, J. |
| 13 | REQUEST by pltff. to produce. |
| 12 | OBJECTION by deft. to pltffs' interrogatories. |
| 12 | ANSWERS by deft. to interrogatories of November 13, 1980. |
| 13 | STATUS CALL: Defts' to file motion for summary judgment. Defts' to submit documents for in camera inspection on March 20, 1981. (Rep: Bruce Herzfeld) OBERDORFER, J. |
| 03 | ORDER filed 3-31-81, directing deft. to file *in camera* submissions by 4-17-81; defts. motion for summary judgment by 5-1-81; pltfs. file response by 5-15-81; deft. to reply 5-29-81. (N) OBFRDORFER, J. |
| 22 | AFFIDAVIT of M. Corley Wonus; attachment. |
| 23 | MOTION of deft. for leave to submit a classified documents in camera; P&As. |
| 27 | NOTICE by deft. of filing documents referenced in the affidavit of M. Corley Wonus; attachment (in green binder). |
| 01 | MOTION by Deft. for summary judgment; P&A's; Statement of Material Facts. |
| 1981 | |
| May 15 | ORDER filed May 13, 1981 allowing deft. to file certain documents *ex parte* and *in camera*. (N) OBERDORFER, J. |
| May 15 | MOTION by Pltfs. to Reconsider filing of In Camera Affidavit |

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| June 10 | MOTION of pltfs. for summary judgment. |
| June 10 | RESPONSE by pltfs. to deft's. motion to file documents in camera; statement. |
| June 10 | RESPONSE by pltf. to deft's. statement of material facts. |
| June 10 | MEMORANDUM by pltf. in support of pltfs.' motion for summary judgment and in opposition to deft's. motion for summary judgment; exhibits A-C. |
| July 14 | MEMORANDUM of points and authorities by deft. in opposition to pltfs. motion for summary judgment. |
| July 14 | RESPONSE by deft. to pltfs.' statement of material facts; second affidavit of M. Corley Wonus; exhibits 1&2. |
| July 27 | MOTION by pltfs. for leave to file response. |
| July 30 | ORDER filed 7-28-81, allowing pltf. until 8-25-81 to reply to opposition to summary judgment motion. (N) OBERDORFER, J. |
| Aug. 24 | REPLY by pltf. to deft's. opposition to pltfs.' motion for summary judgment. |
| Sept. 23 | MOTION of deft. for summary judgment argued and taken under advisement; defts. to submit additional memorandum. (Rep: Bruce Herzfeld) OBERDORFER, J. |
| Oct. 13 | ORDER filed 10-9-81 directing deft. to submit supplemental index and affidavit by 11-9-81 and pltff. to file responses by 11-19-81 and directing parties to inform Court of pending or proposed legislation relevant to the subject matter of this case. (N) OBERDORFER, J. |
| Nov. 09 | NOTICE by deft. of filing the affidavit of Emile L. Julian; affidavit of Emile L. Julian; attachment. |
| Nov. 30 | REPLY by plts. to CIA's index of documents. |
| 1982 | |
| Jan. 13 | MEMORANDUM by deft. to the Court. |
| Jan. 25 | MOTION by deft. for leave to submit a classified affidavit and documents in camera; Memo of P&A's. |

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| Jan. 26 | ORDER setting an in camera inspection of deft's. affidavit on Feb. 1, 1982 at 3:00 P.M. Pltf's. counsel being present so far as possible. Deft. shall produce the said document at that time for inspection by the Court. (N) OBERDORFER, J. |
| Feb. 3 | MEMORANDUM by Pltffs. concerning summary judgment order. |
| Feb. 9 | IN CAMERA conference begun and continued until 2-10-82. (Rep: Arnold A. Cohn) OBERDORFER, J. |
| Feb. 10 | IN CAMERA conference. (Rep: Arnold A. Cohn) OBERDORFER, J. |
| Mar 11 | NOTICE by deft. of filing; affidavit of Louis J. Dube |
| Mar. 10 | IN CAMERA conference. (Rep: E. Craft) OBERDORFER, J. |
| Mar 16 | MEMORANDUM scheduling conference 3-25-82 at 4:30 A.M. and inviting counsel to submit memoranda by 3-23-82. (N) OBERDORFER, J. |
| Mar. 23 | MEMORANDUM by pltf. concering volunteer potential informants. |
| Mar. 25 | IN CAMERA CONFERENCE. OBERDORFER, J. |
| Mar. 30 | IN CAMERA CONFERENCE. OBERDORFER, J. |
| Mar. 31 | REPLY by Deft. to pltffs.' memorandum of March 23, 1982. |
| Apr. 16 | TRANSCRIPT OF PROCEEDINGS taken on 3-25-82; Rep: Elizabeth Craft; pp. 1-4. |
| May 20 | MEMORANDUM to the Court by Deft.; Attachment. |
| May 24 | STATUS CALL in chamber. Rep: T. Dourian OBERDORFER, J. |
| May 25 | AFFIDAVIT by Launie M. Ziebell, Associate General Counsel of the Central Intelligence Agency. |

| | |
|---|---|
| May 26 | MOTION by Deft. to submit an affidavit to the Court under Seal; Memo of P&A's. |
| May 26 | MEMORANDUM to the Court by deft.; Affidavit of Emile L. Julian. |
| May 28 | RESPONSE by Pltffs. to the Memoranda file May 26, 1982. |
| June 1 | SUPPLEMENTAL RESPONSE by Pltffs. to Memoranda filed May 26, 1982. |
| June 16 | MEMORANDUM filed June 15, 1982 (N) OBERDORFER, J. |
| June 16 | ORDER filed June 15, 1982 granting in part and denying in part motions of pltffs. and defts. for summary judgment; and directing defts. to furnish certain information to pltffs. within 30 days. Appendix to Order. (N) OBERDORFER, J. |
| July 6 | TRANSCRIPT OF PROCEEDINGS taken on May 24, 1982; Rep: Thomas Dourian pp. |
| July 9 | MOTION by deft. for stay of Court's Order of June 15, 1982; Memo of P&A's. |
| July 16 | ORDER filed July 14, 1982, granting motion of deft. for stay pending ruling on appeal of order of 6-15-82. (N) OBERDORFER. |
| 1982 | |
| Aug 13 | NOTICE of appeal by deft. from judgment of 6/15/82; U.S. Government no fee; copies mailed to Paul Alan Levy and David C. Vladeck. |
| Aug 16 | COPIES of notice of appeal and docket entries transmitted to U.S.C.A. U.S.C.A. #82-[illegible] |
| Aug. 17 | NOTICE of appeal by pltffs. from orders of 12/22/81, 1/26/82 and 6/15/82; $70.00 paid and credited to the U.S.; copies sent to Paul Alan Levy and John Oliver Birch. |
| Aug. 17 | COPIES of notice of appeal and docket entries transmitted to U.S.C.A. U.S.C.A. #82-1965. |
| Sep. 14 | RECORD ON APPEAL delivered to USCA; receipt acknowledged 9/16/82. |

## UNITED STATES DISTRICT COURT
## FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-2251

JOHN CARY SIMS AND SIDNEY M. WOLFE, M.D.
PLAINTIFFS,

*v.*

CENTRAL INTELLIGENCE AGENCY, DEFENDANT

### TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable LOUIS F. OBERDORFER, one of the Judges of said Court, in camera, in the United States Courthouse, Constitution Avenue and John Marshall Place, N.W., Washington, D.C., on Tuesday, February 9, 1982, commencing at 4:58 p.m.

PRESENT:

JOHN OLIVER BIRCH, Assistant U.S. Attorney

LOUIS J. DUBE, Central Intelligence Agency

LAUNIE M. ZIEBELL, Central Intelligence Agency on behalf of defendant.

* * *

[7] MR. BIRCH: * * * Now, if you were to use the definition that we think is what the Court of Appeals said, logically this type of instance falls within the parameters of "confidentiality of" because it's a mutual relationship. It's not just the CIA promising to the individual: "We'll keep your name silent." It's also the CIA has an independent interest in the confidentiality, the relationship for various operational reasons, and that was the emphasis that we put on it in our motion for summary judgment.

THE COURT: I know, and I ruled on that.

[8] MR BIRCH: And you ruled on it. And I realize that, so that's why—

THE COURT: Your following your argument and not my rule.

MR. BIRCH: Well, I'm saying—I'm prefacing my statement to the Court with, I guess, a statement of disagreement with the ruling for purposes of my standpoint. If the Court wants to say that accepting your ruling that we've added another category, so be it. I think it's a category that logically and clearly was not discussed with us for the Court of Appeals. I think it's also a category that the Court of Appeals would obviously, in my opinion, accept as material worthy of maintaining the protection—

THE COURT: Well, of course, we get back to that old saw about my asking you whether you wanted to invoke Exemption 1, and you didn't. Is that what you're doing now, really?

MR. BIRCH: I don't believe so, Your Honor. I mean—

MR. ZIEBELL: John, might I point out—

MR. BIRCH: Let me follow through on my thoughts.

At the time that we were litigating this case, the parameters of B3 and the parameters of B1 were less [9] indistinct than they were after this decision came down from the Court of Appeals.

I think the interests of the national security are such that if the Court is going to say that I judged it wrong in calling it "B3," but nevertheless the Court in its perception correctly realizes the harm to the national security that would result from the release of the information, and if the Court means that I have to call it "B1" to do that, by all means I'll do it because my ultimate concern is not what it's called but the national security.

THE COURT: But I think originally your concern might have been what it's called. I understood—this ought to be on the record—I understood that we were in the process of trying to get the law interpreted, which is a perfectly acceptable practice to me—and I've been in the tax world where the Internal Revenue Service is always testing what the law is so it can know how to operate it.

Now, I had some impression that you all were engaged in that, so I'm not being critical at all.

* * *

[12] MR. BIRCH: Well, I think that there is one thing. [13] I'd like to say what our position is and then I'd like Mr. Dube to speak to that, if I may, Your Honor.

It's the position of the CIA that identifying an individual with the CIA in the MK-ULTRA project in all instances would put that person subject to question as to whether that person's other activities were identified with the CIA.

THE COURT: All right.

MR. BIRCH: And that's our position.

THE COURT: So your position is that if the person is actually or potentially going to be helping you it will reduce his usefulness, if it doesn't destroy it, to have him fingered in this thing.

MR. BIRCH: What I'm saying is that this individual worked with MK-ULTRA. He worked on another project—

THE COURT: O.K.

MR. BIRCH:—which is different from MK-ULTRA.

THE COURT: But does anybody know whether the disclosure of his being with MK-ULTRA would embarrass him or you in this other connection? That's the question. I didn't see that. That question remained after I read about [Deleted]

MR. DUBE: I think we'd have to assume that it could, and possibly would.

[14] MR. BIRCH: Give us some examples.

THE COURT: Can you give me a hypothetical?

MR. BIRCH: Give him the [Deleted] example.

MR. DUBE: Well, I'm informed of some. I'll give you another example.

THE COURT: Give me your hypothetical, please.

MR. DUBE: We had an individual in touch with a counterintelligence target that we were pursuing, and we were recording all his activities because it was his intention to harm the U.S. Government and the CIA. He suspected one individual was CIA, and he proceeded to publish that name.

[Deleted] he's gone through a lot of suffering because of that. And it was not even confirmed by CIA.

Now, in these cases what we're going to do to these people is we, the CIA, is saying that "You, [Deleted] were a [15] CIA source."

THE COURT: Right.

MR. DUBE: And that is more going beyond just the suspicion. This is Executive acknowledgement—

THE COURT: Right.

MR. DUBE:—that we are making on this individual.

MR. BIRCH: O.K. Could you relate to the Court an instance in which a person was involved in one type of activity—

THE COURT: Well, I can see that. You don't have to spell that out.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-2251

JOHN CARY SIMS, *et al.*, PLAINTIFFS,

*v.*

CENTRAL INTELLIGENCE AGENCY, DEFENDANT.

## DEFENDANT'S ANSWERS TO PLAINTIFFS' INTERROGATORIES OF NOVEMBER 12, 1980

* * *

### MKULTRA SUBPROJECT NO. 4

1. The principal researcher was witting at the time of the project. In Document No. 4-2, a letter to a CIA employee, the principal researcher acknowledges notification that his research project has been approved.

2. See answer with respect to subproject no. 1.

3. The researcher did not perform his research at any particular institution; therefore, no institution was involved in this subproject.

4. One can infer from the documents in the project file that the principal researcher was a party to the research contract. There are a number of receipts of payment of funds by the CIA to the researcher that support an inference that the researcher was a party to a contract. The principal researcher's primary area of expertation was magic and sleight-of-hand. He was engaged, according to Document Nos. 4-20 and 4-29, to produce a manual for CIA personnel to use. In producing the manual, he provided covertly the secrets of his profession as a magician. These secrets are closely held by his peers. Thus, it is highly unlikely that the magician would have produced a manual (which does exist) had he not received a pledge of confidentiality from the CIA that the fact of his employment to produce the manual would not be revealed.

5. No institution was involved in this subproject.

6. Although there is no documentation, it can be inferred from the nature of the research that confidentiality of the researcher's identity was discussed. It can also be inferred from the nature of the research that the promise of confidentiality would have been made prior to the performance of the contract.

7. No institution was involved in this subproject.

8. It can be inferred from the documents in the file and the nature of the research that a guarantee of confidentiality was necessary in order to acquire the information obtained from the subproject. The guarantee would have been required to protect the professional status and reputation of the magician researcher. With respect to 8d through g, see, generally, Defendant's answer with respect to subproject no. 1. There are no documents on which to base an answer to Interrogatory Nos. 8h through j. Document No. 4-29 indicates the uniqueness of the researcher in this field of endeavor.

* * *

### MKULTRA SUBPROJECT NO. 21

In response to Interrogatory Nos. 1 through 9, Defendant states that the principal researcher and the institution at which his activity was conducted are the same as in subproject no. 20. Thus, all answers provided with respect to subproject no. 20 apply to this subproject. Additionally, Document No. 21-5 indicates that the principal researcher was witting of CIA sponsorship, but the institution was not. It also appears from Document No. 21-20 that confidentiality was definitely discussed with the principal researcher at the time of the subproject. In that document, the principal researcher expressed the feeling that his contact with CIA personnel not under cover exposed him to the risk of revealing his connection with the CIA.

* * *

PUBLIC CITIZEN LITIGATION GROUP
Suite 700
2000 P Street N.W.
Washington, D.C. 20036
(202) 785-3704

February 12, 1981

John Oliver Birch, Esquire
Assistant United States Attorney
United States Courthouse
Washington, D.C. 20001

Dear John:

During our conversation yesterday concerning *Sims v. CIA*, we discussed your mention in your Report to the Court that certain researchers were employees of the CIA either before or after their MK-ULTRA work. We do not believe that a researcher's other, undisclosed relationships with the CIA, that are not subject to FOIA disclosure, preclude identification of the researcher. However, I expressed concern that you might identify particular subprojects as having been conducted by individuals who had other, non-disclosable relationships, and then argue that, to reveal the identities of the researchers at that point would be to disclose the fact that those individuals had non-disclosable relationships with the CIA. You agreed that sounded like bootstrapping on your part, but declined to foreclose that course of action. I write to urge you not to identify any particular researcher as having had another employment of otherwise non-disclosable relationship with the CIA, but rather to identify categories of relationship, without mentioning the subproject numbers involved.

Sincerely yours,
/s/ ______________________
PAUL ALAN LEVY

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## UNITED STATES DISTRICT COURT
## FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251

JOHN CARY SIMS, *et al.*, PLAINTIFFS

*v.*

CENTRAL INTELLIGENCE AGENCY, DEFENDANT.

### AFFIDAVIT

M. CORLEY WONUS, being duly sworn, deposes and says:

1. I am the Director of the Office of Technical Service of the Directorate of Science and Technology, Central Intelligence Agency (CIA). The statements made herein are based upon my knowledge, upon information made available to me in my official capacity, upon advice and counsel from the CIA Office of General Counsel and upon conclusions reached in accordance therewith.

2. Through my official duties, I have become acquainted with the Freedom of Information Act litigation brought by the Plaintiff herein against the CIA and with the documents contained in the Project MKULTRA files that are presently withheld in part from the Plaintiff on the basis of exemption (b)(3) of the Freedom of Information Act (FOIA). The purpose of this Affidavit is to advise the plaintiff with respect to the nature and scope of Defendant's, submission to the court *in camera* and to elaborate on the customary practices of CIA in contracting with researchers in the accademic field. Additionally, I will comment on the need to protect from disclosure the identities of researchers who served the CIA in an operational capacity.

3. The CIA is submitting for *in camera* inspection by the Court those documents, including documents recently discovered in the Offices of Security, Personnel and the Directorate of Operations which evidence a relationship of mutual confidentiality between the CIA and the principal researchers. For the sake of uniformity, all researchers have been assigned a number (beginning with number 1), and the identities of the researchers have been arranged in alphabetical order. The Court will see a lack of documen-

tary evidence for some researchers, due to the fact that it either does not exist or the CIA has admitted that the researcher was unwitting. A general description of the documentation that the Court will be viewing has been supplied for each researcher. Newly discovered documentation is noted in these descriptions, as well as the length of time the researcher may have had a relationship with the CIA and/or whether the researcher was employed or involved in operational activity.

4. Documentation made available to the Plaintiff will, with deletions, be identical to that under review by the Court. However, any documentation that discusses operational activity that has not previously been released as part of either the publicly available MKULTRA or Bluebird/Artichoke documents will not be released to the Plaintiff. These documents retain their classified status.

5. One of the major concerns in this litigation has been the lack of documentation evidencing a confidential relationship between the principal MKULTRA researchers and the CIA. A major reason for the lack of such documentation has been the fact that many of the MKULTRA subproject files were destroyed in 1973. Recently, however, a search of Office of Technical Service files produced a memorandum, dated 15 April 1968, which addressed the status of relationships between the CIA and cooperating researchers. It is interesting to note that a characteristic of the class of relationships with the academic community was the absence of a "formal contractual relationship." (*See* attached copy of the Memorandum For Executive Director-Comptroller, dated 15 April 1968.) A policy of that nature would have accounted for the absence, with respect to the majority of the principal researchers, of a formal contract. However, the absence of a formal contract does not remove the onus of guaranteeing confidentiality to the researchers. As will be seen in the submission to the Court and the Plaintiffs, the confidentiality between the researchers and the CIA was often documented by memoranda of agreement or memoranda of understanding or secrecy agreements or, as often the case, by the memorialization in memoranda form of the contacts between researchers and CIA representatives on an informal basis or through the clearance process.

6. It has always been the CIA's position that the guarantee of confidentiality that the CIA provides to intelligence sources, in general, and academic or industrial researchers, in particular, exists whether there is documentary evidence or not. In the intelligence business, often a verbal assurance of confidentiality is the only means by which a relationship of intelligence gathering, or operation participation, can be maintained. Such is the customary practice of the CIA. In this regard, it should also be noted that at the time of the MKULTRA research projects, the Office of Technical Service was organizationally a component of the Directorate of Operations and, as such, the guidelines of that Directorate, and the general policy with respect to covert relations with intelligence sources, also held true where the academic community was concerned. All such relationships, whether with researchers or classical intelligence sources, would have been covert and all researchers, whether witting or unwitting, would have been regarded as intelligence sources or providers of intelligence. Operating under such a policy would further have required that correspondence between the Office of Technical Service personnel and the researchers be kept at a minimum to ensure project security. In essence, therefore, a lack of documentary evidence of a confidential relationship between the CIA and a principal researcher, or with respect to the financing of the research of unwitting researchers, should not be interpreted to mean that no confidential relationship of any kind existed. On the contrary, the documentation that will be submitted to the Court raises a strong inference, based upon the customary practices and policies described above, that confidentiality between the researchers and CIA did exist and more than likely was memorialized in a CIA memorandum.

7. Some of the researchers involved in MKULTRA projects participated prior to, during and after their involvement in MKULTRA research in operational activity. The participation in operational activity on behalf of the CIA requires that the CIA guarantee the confidentiality of the

participant virtually forever. All operational activity is performed without attribution to the CIA or CIA sources. Thus, should the names of the principal researchers in the MKULTRA subprojects be revealed, persons who were in contact with the researchers during a particular operation would have little trouble in identifying the operation as a CIA operation. If such were done, there is a possibility that the lives of the principal researchers or of their families would be placed in jeopardy. Additionally, the contacts of the researchers in foreign countries would become immediately suspect. In some nations, mere suspicion of espionage is all that is necessary for incarceration. In the case of one researcher, for example, his operational activity on behalf of the CIA was of such a sensitive nature that the mere disclosure of his name in the context of the MKULTRA projects will have severe consequences for the diplomatic relations of the United States. It is, therefore, with great concern that the CIA seeks to prevent the disclosure of those principal researchers who also engaged in operational activity on behalf of the CIA.

Executed this 17th day of April, 1981.

/s/ ____________________
M. CORLEY WONUS

STATE OF VIRGINIA,
COUNTY OF FAIRFAX, to wit:

SUBSCRIBED and SWORN TO before me this 17th day of April, 1981.

/s/ ____________________
*Notary Public*

My Commission Expires:
July 24, 1983.

---

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251

JOHN CARY SIMS, ET AL., PLAINTIFFS,

*v.*

CENTRAL INTELLIGENCE AGENCY, DEFENDANT.

[FILED JUNE 14 1981]

## SECOND AFFIDAVIT

M. CORLEY WONUS, being duly sworn, deposes and says:

1. I am the Director of the Office of Technical Service of the Directorate of Science and Technology, Central Intelligence Agency (CIA). The statements made herein are based upon my knowledge, upon information made available to me in my official capacity, upon advice and counsel from the CIA Office of General Counsel and upon conclusions reached in accordance therewith.

2. Through my official duties, I have become acquainted with the Freedom of Information Act litigation brought by the Plaintiffs herein against the CIA and with the documents contained in the Project MKULTRA files that are presently withheld in part from the Plaintiffs on the basis of exemption (b)(3) of the Freedom of Information Act (FOIA). The purpose of this Affidavit is to address the points raised by the Plaintiffs in their Motion For Summary Judgment with respect to the sufficiency of my Affidavit of April 17, 1981 and with respect to the position of the CIA, in general, in this case. It is the intent of this Affidavit to provide a definitive statement with respect to the need for further protection of the names of principal researchers and institutions, not revealed, from disclosure.

3. The first point raised in Plaintiffs' Memorandum in support of their Motion For Summary Judgment, at page 5, concerns my credentials and ability to speak knowledgeably about the MKULTRA projects. The practice, at least in CIA cases, of having the office director or chief of the office from which responsive FOIA documents have been retrieved, address the withholding basis for the documents or the CIA's position, has been widely accepted by courts in the District of Columbia Circuit and other circuits. As Director of the Office of Technical Service, I possess both actual and imputed knowledge of programs currently under my control as well as those which were conducted in the past.

4. I believe that the knowledge gained by my association with the Office of Technical Service more than qualifies me to speak about the MKULTRA program. However, I also rely on more than fifteen years of experience as an operations officer who actively engaged in the intelligence collection process as an additional basis for my statements herein and in my Affidavit of April 17, 1981 concerning the protection of the researchers as intelligence sources and the consequences stemming from a revelation of an association with CIA in an operational capacity. I further rely on my years of experience as an operations officer as a basis for the statement in my April 17, 1981 Affidavit that because the Office of Technical Service was organizationally a part of the Directorate of Operations during the 1950s and 1960s, researchers on sensitive projects such as MKULTRA would have been regarded as intelligence sources, irrespective of whether a particular researcher was either witting or unwitting of CIA sponsorship of his scientific or sociological research. It is an accepted fact within CIA that with the exception of the Director of Central Intelligence, the best spokesperson for the need to protect intelligence sources is the operations officer who, through his current and past duties, has had to persuade intelligence sources, whether institutions, researchers, businessmen or foreign government officials, that the CIA will never under any circumstances divulge the relationship of the source with the CIA. I have provided such assurances and I am totally familiar as to how, why and under what circumstances they should be provided.

5. The Plaintiffs argue in their Memorandum that the MKULTRA researchers and institutions do not meet the definition of intelligence source formulated by the Court of Appeals which states that an intelligence source is:

> [A] person or institution that provides, has provided or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain, without guaranteeing the confidentiality of those who provide it. 642 F.2d at 571.

The initial argument of the Plaintiffs is that the MKULTRA researchers do not meet the test of the first part of the definition. The documentation submitted both on the record and for *in camera* review clearly shows that the witting researchers were engaged to provide and did, in fact, provide the fruits of their research to the CIA. The documents, and additionally the Answers to Plaintiffs' Interrogatories, also show that the unwitting researchers did provide research to the CIA even though that research passed through a funding entity on its way to CIA. In further support of this fact, the Court is referred to the 1963 Report of the Inspector General of the CIA with respect to MKULTRA and the attachments to that Report. A copy of this Report and attachments thereto are attached to this Affidavit as Exhibit "I". The Inspector General made the following statement in 1963 as to how and why the principal researchers were engaged to provide MKULTRA research:

> The search for new materials, *e.g.*, psilocybin from Mexican mushrooms, or a fungi occurring in agricultural crops, is conducted through standing arrangements with specialists in universities, pharmaceutical houses, hospitals, state and federal institutions, and private research organizations who are authorities in the given field of investigation in their own right. Annual grants of funds are made under ostensible research foundation auspices to the specialists located in the public or quasi-public institution. This approach conceals from the institution the interest of CIA and

> permits the recipient to proceed with his investigation, publish his findings (excluding intelligence implications), and account for his expenditures in a manner normal to his institution.... Key individuals must qualify for top secret clearance and are made witting of agency sponsorship. As a rule each specialist is managed unilaterally and is not witting of agency support of parallel MKULTRA research in his field. The system in effect "buys a piece" of the specialist in order to enlist his aid in pursuing the intelligence implications of his research. His services basically include systematic search of the scientific literature, procurement of materials, their propagation, and the application of test dosages to animals and under some circumstances to volunteer human subjects. Exhibit 1, pages 7 and 8.

It is clear that the first part of the definition has been met with respect to witting researchers. The witting researchers were engaged to provide the intelligence aspects of their research to the CIA and, in fact, did provide such intelligence. One can also conclude that the unwitting researchers provided information and the fruits of their research to the CIA.

6. In general, IG audits of intelligence programs are very thorough. We must, therefore, assume that the IG had the benefit of reviewing the material subsequently destroyed in 1973. It is believed that this material constituted the progress reports and final results of each MKULTRA researcher's findings. As is shown by the proposal attached to a memorandum, dated 3 April 1953 (as Tab A thereto), which is also attached to the 1963 IG Report, the original intent with respect to the principal researchers was to keep their knowledge of CIA sponsorship to a minimum. Paragraph 4 of the proposal states:

> [I]n a great many instances the work in field (a) [MKULTRA] must be conducted by individuals who are not and should not be aware of our (CIA) interest....

One can see from the MKULTRA financial records between 1953 and 1964 that unwitting researchers were, in fact, utilized as the original intent of the program suggested and did, in fact, provide information of intelligence value.

7. Plaintiffs also believe that the principal researchers do not qualify as intelligence sources because they do not meet the test of the second part of the Court's definition. The 1963 Inspector General's Report removes all doubt as to whether the MKULTRA research was necessary for the CIA to accomplish its intelligence mission. The Report discusses the operational use of MKULTRA material development as a result of a multi-phase developmental process which included the utilization of both principal researchers and institutions. It should be understood that the intelligence rationale for the research expressed in the 1953 project proposal (attached to the IG Report) remained viable, as shown in the IG Report during the ten-year period of investigation and utilization of drug and behavior modification techniques. In assessing a need for such a capability, the 1953 proposal noted the following in paragraph 3(a):

> (a) Research to develop a capability in the covert use of biological and chemical materials. This area involves the product of various physiological conditions which could support present or future clandestine operations. Aside from the offensive potential, the development of a comprehensive capability in this field of covert chemical and biological warfare gives us a thorough knowledge of the enemy's theoretical potential, thus enabling us to defend ourselves against a foe who might not be restrained in the use of these techniques as we are. For example, we intend to investigate the development of a chemical material which causes a reversible non-toxic aberrant mental state, the specific nature of which can be reasonably well predicted for each individual. This material could potentially aid in discrediting individuals, eliciting information, implanting suggestion and other forms of mental control. See page 1 of Project MKULTRA proposal attached to the 3 April 1953 Memorandum identified as Attachment A to the 1963 IG Report.

8. The CIA believes that the test of "*needs to perform its intelligence functions effectively*" has been met by the above-expressed rationale for the project. Moreover, the use of drugs and behavior modification techniques in actual intelligence collections as noted by the Inspector General

more than establishes compliance with the second part of the Court of Appeals definition. The IG Report, on page 16, notes that MKULTRA produced materials or research had been used in approximately 100 operations over an eight-year period. Additionally, nine other operations employed the use of drugs under MKDELTA controls (MKDELTA was the operational use of MKULTRA research). These statements are supported by the documentation discovered in response to a request by John Marks and which were the subject matter of a suit brought by Mr. Marks against the CIA. In an Affidavit filed in that case (*Marks* v. *CIA*, Civil Action No. 76-2073, United States District Court for the District of Columbia), a copy of which is attached hereto as Exhibit "2", the operational use of MKULTRA materials and research is discussed. The CIA believes that the actual operational use, as well as the proposed use expressed in the April 3, 1953 Project Report, more than establish that the principal researchers qualify under the second part of the Court of Appeals definition as intelligence sources. The CIA, in 1953, perceived a need to develop a defensive expertise in the use of drugs and behavior modification techniques. The CIA, in fact, from 1953 to 1963 did use the product of the MKULTRA research in approximately 109 intelligence collection operations. One can assume that the research products that were used in these operations were provided by both witting and unwitting researchers.

9. The Plaintiffs, in their Memorandum in Support of their Motion For Summary Judgment, further contend that the CIA fails to meet the third part of the Court's definition because, according to the Plaintiffs, the CIA does not show that the information could only have been obtained from the principal researchers pursuant to a guarantee of confidentiallity. The Plaintiffs contend that the mini-descriptions provided to Plaintiffs and the Court and my previous Interrogatory Answers and Affidavit show, with very few exceptions, that the guarantee of confidentiallity was a one-sided guarantee made in favor of the CIA only. The CIA is pleased the Plaintiffs have conceded that there was a guarantee of confidentiality between the CIA and the principal researchers. The Plaintiffs, in their analysis of

MKULTRA principal researcher files, more than establish this fact. The CIA believes that the Court of Appeals' definition of an intelligence source recognizes, as so stated by the Court, the need for confidentiality of the CIA's *interest* in an intelligence activity. This need for confidentiality has been asserted in most of the CIA cases brought before the Court of Appeals. Thus, it is improbable that the Court would fashion a definition which only considered providing confidentiality *to* intelligence sources. Such a definition would narrow the field of sources drastically and exclude unwitting sources, covert action and operational activity altogether. The CIA believes that the Court used the word "of" in defining the confidential relationship instead of the word "to" in order to ensure that the CIA's interest as well as the source's interest would be mutually served. Thus, if Plaintiffs agree that the CIA has established by previous filings and documentation that it has met the test of guaranteeing the confidentiality *of* those who provide information by guaranteeing through memoranda of understanding, memoranda of agreement and/or secrecy agreements the entire relationship, the CIA need not offer further evidence to establish that it has met the Court's definition of intelligence source. However, agreements of confidentiality are mutual. The April 3, 1953 proposal attached to the IG Report notes, in paragraph 5, the need to provide confidentiality of the relationship in order to protect the interest and concerns of the researchers. The proposal states:

> In many cases in field (a) [MKULTRA] where the researcher can be cleared and may be aware of our interest in the program, he is unwilling to have his name on a contract which remains out of his control in our files. Experience has shown that qualified competent individuals in the field of pharmacological, physiological, psychiatric and other biological sciences are most reluctant to enter into signed agreements of any sort which connect them with this activity since such a connection would jeopardize their professional reputations.

In an attempt to guarantee for MKULTRA researchers that their association with CIA would not be brought to light or publicized, the proposers of MKULTRA recommended the following on page 4 of the proposal in paragraph 9(d):

> (d) in the case of each project, TSS will reach an understanding with the individuals who will perform the work as to the conditions under which the work will be performed and reimbursement arranged. No standard contract will be signed. In some cases, when possible, a memorandum of agreement will be signed and retained in the TSS files. Under no circumstances would copies of such agreements leave TSS files where they will be kept available for inspection.

The *understanding* reached with each researcher which Plaintiffs have characterized as one-sided are proved by the project proposal paragraph quoted above to have been *mutual* as the CIA has consistently contended. Moreover, it is possible that with respect to the MKULTRA unwitting researchers the actual intent of the MKULTRA project directors was to make each researcher witting and that the documentation evidencing this fact simply has been destroyed. It would do a disservice to the unwitting researchers to release their names simply because the CIA has no piece of paper showing a witting confidential relationship and later find that the researchers were, in fact, witting. As previously noted, it was from 1953 to 1963, as it currently is, the customary practice of CIA to guarantee confidentiality of every intelligence relationship, whether or not in the context of MKULTRA activity and irrespective of a witting or unwitting status of sources or participants. The need for obtaining the information and the ability to acquire it were the deciding factors and not necessarily an expressed desire of an individual source for confidentiality. The CIA believes that it is this concern that is articulated in the Court of Appeals definition.

10. With respect to researchers that may be deceased, I state, based upon my years of experience, that revelation of any CIA-source relationship, no matter how noble the purpose, undermines the ability of the CIA to successfully carry out its intelligence gathering mission. Thus, the CIA continues to decline to reveal the names of those researchers who may, in fact, be deceased.

11. With respect to institutions whose identities have not been released, the CIA admits that the only viable basis for continuing withholding their identities is a threat of damage to existing intelligence-related arrangements with the institutions or exposure of past relationships with the institutions. Concerns of this nature were expressed to the Court in *Gardels* v. *CIA*, C.A. No. 78-330 (D.C.D.C Opinion March 31, 1981), and other cases in which requesters have sought exposure by the CIA of the extent of its relationship with a particular university or institution. The argument that release of the institutions in the context of MKULTRA will not have an effect on other relations between the CIA and the institution is naive. Engaging an institution to provide information which the CIA needs to perform its intelligence functions may be required in a national security emergency on a covert basis. Disclosure of the MKULTRA association with an undisclosed institution in disregard of a request from the institution for confidentiality, I believe, will have a detrimental effect on the CIA's ability to collect information from the personnel of the institution in such an emergency.

12. The majority of the 58 institutions whose names were previously relesed acknowledged in some fashion a letter sent to each identifying its involvement in MKULTRA research projects. The letter, which the CIA sent in compliance with a congressional request constituted official confirmation of the involvement of the institutions. Thus, when the institutions either publicized the letter or commented upon receiving it to the press, the CIA could not maintain the confidentiality of the identities of such institutions. Thus, in response to the Plaintiff's request, the CIA released those institutional names. The names it has not released are of institutions that have not gone public with a CIA letter or which are engaged in further protection of the identities of the principal researchers. The CIA respects their confidentiality from a policy standpoint and as potential or past sources of information related to the CIA's intelligence mission.

13. Finally, the Plaintiffs, in their Memorandum of Law, refer to the book written by John Marks, *The Search for*

*the Manchurian Candidate, 1978* as disclosing the names of the principal researchers. The CIA notes that the Plaintiffs strongly believe, and have asserted their belief in their Statement of Material Facts, that Mr. Marks' book actually does reveal, with accuracy, the names of the principal researchers. Without confirming the validity of Mr. Marks' findings, Defendant suggests that the Plaintiffs could look to Mr. Marks for help in contacting those believed to be MKULTRA researchers and turn their attention from the CIA. Such a course of action would satisfy the Plaintiffs' previously expressed need for the names and enable the CIA to avoid the consequential damage to its intelligence collection capability that a court-ordered release would certainly engender.

/s/ M. Corley Wonus
M. CORLEY WONUS

STATE OF VIRGINIA,
COUNTY OF FAIRFAX, to wit:

SUBSCRIBED and SWORN TO before me this 13th day of July 1981.

/s/ LINDA A. KERNS
Notary Public

My Commission Expires:
JULY 24, 1983.

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26 July 1963

MEMORANDUM FOR: Director of Central Intelligence

SUBJECT: Report of Inspection of MKULTRA

1. In connection with our survey of Technical Services Division, DD/P, it was deemed advisable to prepare the report of the MKULTRA program in one copy only, in view of its unusual sensitivity.

2. This report is forwarded herewith.

3. The MKULTRA activity is concerned with the research and development of chemical, biological, and radiological materials capable of employment in clandestine operations to control human behavior. The end products of such research are subject to very strict controls including a requirement for the personal approval of the Deputy Director/Plans for any operational use made of these end products.

4. The cryptonym MKULTRA encompasses the R&D phase and a second cryptonym MKDELTA denotes the DD/P system for control of the operational employment of such materials. The provisions of the MKULTRA authority also cover [Deleted]. The administration and control of this latter activity were found to be generally satisfactory and are discussed in greater detail in the main body of the report on TSD.

5. MKULTRA was authorized by the then Director of Central Intelligence, Mr. Allen W. Dulles, in 1953. The TSD was assigned responsibility thereby to employ a portion of its R&D budget, eventually set at 20%, for research in behavioral materials and [Deleted] under purely internal and compartmented controls, (further details are provided in paragraph 3 of the attached report). Normal procedures for project approval, funding, and accounting were waived. However, special arrangements for audit of expenditures have been evolved in subsequent years.

6. The scope of MKULTRA is comprehensive and ranges from the search for and procurement of botanical and chemical substances, through programs for their analysis in scientific laboratories, to progressive testing for effect on ani-

mals and human beings. The testing on individuals begins under laboratory conditions employing every safeguard and progresses gradually to more and more realistic operational simulations. The program requires and obtains the services of a number of highly specialized authorities in many fields of the natural sciences.

7. The concepts involved in manipulating human behavior are found by many people both within and outside the Agency to be distasteful and unethical. There is considerable evidence that opposition intelligence services are active and highly proficient in this field. The experience of TSD to date indicates that both the research and the employment of the materials are expensive and often unpredictable in results. Nevertheless, there have been major accomplishments both in research and operational employment.

8. The principal conclusions of the inspection are that the structure and operational controls over this activity need strengthening; improvements are needed in the administration of the research projects; and some of the testing of substances under simulated operational conditions was judged to involve excessive risk to the Agency.

9. Attached for the signature of the Deputy Director of Central Intelligence is a memorandum transmitting the report to the Deputy Director/Plans requesting a summary of action taken or comments on the recommendations contained therein.

/s/ J. Earman
J. EARMAN
Inspector General

Attachments—as stated

## REPORT OF INSPECTION OF MKULTRA/TSD

### I. Introduction

* * *

5. The inspection of MKULTRA projects in biochemical controls of human behavior raised questions in the following area of policy and management which are dealt with in the balance of this report:

a. Scope of the MKULTRA chapter:

(1) Over the ten-year life of the program many additional avenues to the control of human behavior have been designated by the TSD management as appropriate to investigation under the MKULTRA charter, including radiation, electro-shock, various fields of psychology, psychiatry, sociology, and anthropology, graphology, harassment substances, and paramilitary devices and materials.

(2) Various projects do not appear to have been sufficiently sensitive to warrant waiver of normal Agency procedures for authorization and control.

(3) Other secure channels for establishment and funding of Agency-sterile activities have been evolved over the past ten years by Deputy Director/Support (DD/S) and in some cases could reasonably be employed by TSD in lieu of MKULTRA procedures.

In view of these developments there is substantial agreement among all parties concerned that redefinition of the scope of MKULTRA is now appropriate.

b. MKULTRA management policies:

* * *

(3) MKULTRA records afforded no such approach to inspection. There are just two individuals in TSD who have full substantive knowledge of the program and most of that knowledge is unrecorded. Both are highly skilled, highly motivated, professionally competent individuals. Part of their competence lies in their command of intelligence tradecraft. In protecting the sensitive nature of the American intelligence capability to manipulating human behavior, they apply "need to know" doctrine to their professional associates and to their clerical assistance to a maximum degree. Confidence in their competence and discretion has been a vital feature of the management of MKULTRA.

* * *

## II. Modus Operandi

6. The research and development of materials capable of producing behavioral or physiological change in humans is now performed within a highly elaborated and stabilized MKULTRA structure. The search for new materials; e.g., psilocybin from Mexican mushrooms, or a fungi occurring in agricultural crops, is conducted through standing arrangements with specialists in universities, pharmaceutical houses, hospitals, state and federal institutions, and private research organizations who are authorities in the given field of investigation in their own right. Annual grants of funds are made under ostensible research foundation auspices to the specialists located in the public or quasi-public institutions. This approach conceals from the institution the interest of CIA and permits the recipient to proceed with his investigation, publish his findings (excluding intelligence implications), and account for his expenditures in a manner normal to his institution. A number of the grants have included funds for the construction and equipping of research facilities and for the employment of research assistants. Key individuals must qualify for top secret clearance and are made witting of Agency sponsorship. As a rule each specialist is managed unilaterally and is not witting of Agency support of parallel MKULTRA research in his field. The system in effect "buys a piece" of the specialist in order to enlist his aid in pursuing the intelligence implications of his research. His services typically include systematic search of the scientific literature, procurement of materials, their propagation, and the application of test dosages to animals and under some circumstances to volunteer human subjects. No quarrel is found with the rationale of this program to the extent that it fits the original MKULTRA charter. However, for inspection purposes, there were lacking records, year by year, of the progress of each project and the recorded judgments of the project monitors on operational benefits vis-a-vis costs.

7. The funding of sensitive MKULTRA projects by sterile grants in aid as noted in the preceding paragraph disclosed one of the principal controversial aspects of this program. The original charter of MKULTRA assumed that the sensitivity of activities would be sufficient to justify both a) special protection for the researcher; and b) compartmentation of MKULTRA knowledge within the Agency. On this basis the inherent safeguards of DD/S procedures were

waived, the DD/S was not consulted in the design of the MKULTRA management system, and established Agency audit procedures were waived. In the subsequent administration of the program, however, TSD has found it feasible to contract for some of the research on MKULTRA objectives in accordance with prescribed DD/S procedures. The DD/S, in turn, has evolved various secure systems for the funding of sensitive activities. It appears feasible and appropriate, therefore, to propose that the DD/S be consulted during the re-chartering of MKULTRA in the design of an administrative system that does justice to his responsibilities as well as to the management and security requirements of TSD. The Inspector General accordingly has recommended at the end of this report that the DD/S be consulted in the re-design of the system; that the Chief, Support, TSD, be assigned responsibility for the day-to-day support of MKULTRA; and that the latter constitute a bridge of the DD/S for monitoring the future evolution of the system.

* * *

## IV. Management of MKULTRA

* * *

32. The current management of TSD has initiated a policy of directing the activities of MKULTRA and of the Behavioral Activities Branch towards operations and away from long-range research. Prior to this change in policy which ocurred in 1962, MKULTRA sponsored a large number of projects in the fields of applied psychology, sociology, anthropology, and graphology. The present management is unlikely to return to these fields of research under the MKULTRA charter. The inspectors concluded that many of these projects were of insufficient sensitivity to justify waiver of normal Agency control procedures. It is recommended at the end of this report that projects falling outside the authorized scope of MKULTRA henceforth require the prior written approval of the DD/P to qualify for MKULTRA processing.

* * *

3 April 1953

MEMORANDUM FOR: Director, Central Intelligence

SUBJECT: Two Extremely Sensitive Research Programs

1. Approximately 6% of the TSS research and development effort lies in two highly sensitive fields in which it is not possible to conduct the work through the customary contracts for security reasons and other considerations.

2. These two sensitive fields are:

a) Covert studies of biological and chemical warfare
b)

3. Permission of the DCI is requested to handle work in these two fields in the manner outlined in Tab A without contracts and with reimbursement to be made against invoices properly certified by TSS.

4. All controls established in the PRC approval of the original Research program (other than signing of a contract) would remain unchanged. Periodic financial and progress reports will be made. All documents will be retained by TSS.

5. No new funds are involved. This procedure would apply to funds previously approved for research.

6. Tab B is a memorandum to the Deputy Director (Administration) for your signature authorizing this procedure.

/S/

RICHARD HELMS
*Acting Deputy Director (Plans)*

Attachments: (2)
Tab A—Description of Project MKULTRA and the controls which will be exercised over its execution
Tab B—Suggested memorandum from DCI to DD/A authorizing payment of invoices under Project MKULTRA

Distribution:
Addressee—Orig & 1 w/attachments
DD/P—1 w/attachments
TSS/OC—1 w/attachments
Exec. Reg.-1/attachments

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## PROJECT MKULTRA EXTREMELY SENSITIVE RESEARCH AND DEVELOPMENT PROGRAMS

1. On 6 June 1952, the Project Review Committee approved the TSS Research Program for Fiscal Year 1953.

2. The PRC approval authorized the Director of Research, at his discretion and with the approval of the Research Chairman, to apportion and obligate the research funds among individual projects, such projects to be subject to the usual Agency procedures and administrative controls.

3. This Research Program has been actively underway since the middle of 1952 and has gathered considerable momentum during the past few months. It is now evident on the basis of work currently underway that approximately 94% of the projects contemplated can be handled through regular procurement channels by means of the customary contracts signed jointly by the Agency and the organization undertaking to carry out the work. It has also become apparent that approximately 6% of the projects are of such an ultra-sensitive nature that they cannot and should not be handled by means of contracts which would associate CIA or the Government with the work in question. This 6% of the current research effort now lies entirely within two well-defined fields of endeavor, namely:

(a) Research to develop a capability in the covert use of biological and chemical materials. This area involves the production of various physiological conditions which could support present or future clandestine operations. Aside from the offensive potential, the development of a comprehensive capability in this field of covert chemical and biological warfare gives us a thorough knowledge of the enemy's theoretical potential, thus enabling us to defend ourselves against a foe who might not be as restrained in the use of these techniques as we are. For example: we intend to investigate the development of a chemical material which causes a reversible non-toxic aberrant mental state, the specific nature of which can be reasonably well predicted for each individual. This material could potentially aid in discrediting individuals, eliciting information, implanting suggestion and other forms of mental control;

(b) [Deleted]

4. It is highly undesirable from a policy and security point of view that contracts should be signed indicating Agency or Government interest in either of these two fields. In a great many instances the work in field (a) must be conducted by individuals who are not and should not be aware of our interest. In *all* cases dealing with field (b), it is mandatory that any connection with the Agency should be known only to an absolute minimum number of people who have been specifically cleared for this purpose. In no case should any manufacturer or supplier be aware of Government interest.

5. In many cases in field (a) where the researcher can be cleared and may be aware of our interest in the program, he is unwilling to have his name on a contract which remains out of his control in our files. Experience has shown that qualified, competent individuals in the field of pharmacological, physiological, psychiatric and other biological sciences are most reluctant to enter into signed agreements of any sort which connect them with this activity since such a connection would jeopardize their professional reputations.

6. Even internally in CIA, as few individuals as possible should be aware of our interest in these fields and of the identity of those who are working for us. At present this results in ridiculous contracts, often with cut-outs, which do not spell out the scope or intent of the work and which contain terms which the cut-out cannot incorporate in his contract with the researcher without revealing Government interest. Complete Government audits of such contracts are impossible for the same reason.

7. It is, therefore, requested that the DCI authorize TSS to handle 6% of the previously approved research budget for FY '53 without the establishment of formal contractual relations. This program will be known as Project MKULTRA.

8. It is suggested that payment of invoices under Project MKULTRA forwarded by TSS be authorized, provided that:

(a) the total of such invoices does not exceed 6% for Fiscal Year 1953;

(b) the invoices carry a certification by the TSS Research Director that payment of funds is authorized and that the invoices represent work accomplished within the program approved by the DCI under Project MKULTRA as outlined in this memorandum;

(c) the invoices carry the certification of the Executive Secretary of the Research Board that the scope of the program has been approved;

(d) the invoices carry the certification of the cognizant TSS Division Chief that the work has been satisfactory from a technical point of view.

9. It should be emphasized that this authorization does not involve any new allocation of funds, but merely applies to a portion of a previously approved budget. The TSS certifications mentioned above will mean that:

(a) the project is being handled under the conditions set forth in this description and specifically falls within one of the two ultra-sensitive fields mentioned above;

(b) the project has been approved in the manner provided for in the PRC document which originally set up and approved the over-all TSS Research Program. Each project will thus have been presented by the Chief of the Division monitoring the work to this Research Director and to the Research Chairman and will have, as in the past, to be approved by both before any expenditures are made;

(c) technical control over the project will be exercised by the TSS Division Chief and Project Engineers to the same extent now applying to projects handled in the normal fashion. Technical reports will be rendered when necessary and advisable and will be available for inspection in TSS files at any time;

(d) in the case of each project, TSS will reach an understanding with the individuals who will perform the work as to the conditions under which the work will be performed and reimbursement arranged. No standard contract will be signed. In some cases when possible, a memorandum of agreement will be signed and retained in the TSS files. Under no circumstances would copies of such agreements leave TSS files where they will be kept available for inspection,

(e) the manner in which the work will be handled and methods of maintaining Agency and Government sterility will be worked out with the Inspection & Security Office as in the past, and clearance of individuals to the extent deemed necessary by TSS and I & SO will be obtained:

(f) invoices, when received by TSS, will be forwarded to Finance Division for payment and will be certified as outlined in Paragraph 8 above. Whenever documents are available supporting a portion or all of a given invoice, such as cancelled checks, receipted bills, etc., these will be requested by TSS and retained in the TSS files in support of the invoice, where they will at all times be available for inspection. They will not be forwarded with the invoices. Such documents at best will only cover a portion of the total expenditures, and regular audit procedures will not be followed;

(g) other provisions and controls over the Research Program specified in the original PRC approval will remain unaltered. Technical progress under the separate projects handled under Project MKULTRA will be included whenever necessary in the regular progress reports now submitted by the Director of Research. The monthly budget and financial report being submitted by TSS to DD/A will include full financial information on these projects, including how much of the 6% has been committed, how much has been spent and how much remains.

10. The establishment and approval of Project MKULTRA will allow TSS to undertake highly desirable and necessary research in these two sensitive fields which would not be possible unless the work can be handled in this manner.

Distribution:
Addressee—Orig. & 1
DD/P—1
TSS/OC—1
Exec. Registry—1

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CENTRAL INTELLIGENCE AGENCY
WASHINGTON 25, D.C.
Office Of The Director

Apr 13, 1953

MEMORANDUM FOR:
DEPUTY DIRECTOR (ADMINISTRATION)

SUBJECT: Project MKULTRA—Extremely Sensitive Research and Development Program

1. On 6 June 1952, the Project Review Committee approved the DD/P/TSS Research Program for Fiscal Year 1953.

2. The PRC approval authorized the Director of Research, at his discretion and with the approval of the Research Chairman, to obligate the research funds and apportion them among individual projects, such projects to be subject to the usual Agency procedures and administrative controls.

3. A small part of the Research Program contemplated by TSS and discussed with me consists of ultra-sensitive work. The nature of the research and the security considerations involved preclude handling the projects by means of the usual contractual agreements.

4. I have, therefore, approved the obligation and expenditure by TSS of 6% of the total budget, already approved by the PRC for research for FY '53 without the signing of the usual contracts or other written agreements.

5. This 6% will be handled as Project MKULTRA. Would you please make the necessary arrangements so that invoices forwarded by TSS applying to MKULTRA will be paid, provided that:

a) in the aggregate, they do not exceed 6% for FY '53 without further authorization from me;

b) each invoice is to bear a certification by the Chief, DD/P/TSS, as the Research Director, that the invoice applies to Project MKULTRA and that the conditions outlined in the DD/P memorandum for DCI dated 3 April have been complied with. The certification will also request that payment be made;

c) the invoice shall bear the certification of the Executive Secretary of the Research Board that the scope of the program has been approved;

d) the invoice shall bear the certification of the cognizant TSS Division Chief that the work has been satisfactorily performed from a technical point of view and has been carried out in accordance with the understandings reached between TSS and the individual or concern doing the work.

6. No further documents will be required to justify payment of the invoices. Exacting control will be maintained over the Project by TSS. Although no formal contract will be signed, it will occasionally be possible for TSS to sign an informal agreement with the individual or concern performing the work. In such cases TSS will retain in its files all documents. TSS will endeavor wherever possible to obtain documentary support of invoices, such as cancelled checks, receipted bills, etc., and these will remain in TSS files. Such documents at best will only cover a portion of the total expenditures and the regular audit procedure will not be followed.

7. Other provisions and control over the Research Program specified in the original PRC approval remain unaltered. The monthly budget and financial record being submitted by TSS to DD/A will include financial information on the work being conducted under Project MKULTRA, showing how much of the 6% has been committed, how much has been spent, and how much remains.

/S/ ______________________
**Allen W. Dulles**
*Director, Central Intelligence*

*Addressee—Orig. & 1*
*DD/P—1*
*TSS/OC—1*
*Exec. Registry—1*

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## UNITED STATES DISTRICT COURT
## FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2251

John Cary Sims, et al., Plaintiffs,

*v.*

Central Intelligence Agency, Defendant.

### AFFIDAVIT

LOUIS J. DUBE, being first duly sworn, does hereby depose and say:

1. I am the Information Review Officer of the Directorate of Operations (DO), Central Intelligence Agency (CIA). I was appointed to this position in March, 1981. I have held operational and executive positions in the DO since 1952. The statements made herein are based upon my personal knowledge, upon information made available to me in my official capacity, upon advice and counsel from the Office of the General Counsel and upon conclusions reached in accordance therewith.

2. Through my official duties, I have become acquainted with the Freedom of Information Act (FOIA) litigation brought by the Plaintiffs herein against the CIA. On February 9th and 10th, I presented to the Court *in camera* orally and in a classified Affidavit my concerns with the effect that disclosure of the names of twenty-one (21) principal researchers would have on the lives of these individuals and CIA intelligence collection programs. These twenty-one (21) principal researchers whose identities have been withheld were involved in foreign intelligence activities entirely unrelated to their MKULTRA activities.

3. At that time, I also advised the Court of a belated discovery of additional, possibly relevant, records. Specifically, the Domestic Contacts Division (DCD) had recently been merged with the Directorate of Operations (DO). The

records of the DO were checked in January of 1981 during the search for records which might show evidence of agreements of confidentiality between the CIA and MKULTRA researchers. The DCD records, however, were not integrated into the DO records system until the summer of 1981, and, we have discovered recently, were not checked separately in January of 1981. Since the DCD is responsible for the use of American citizens who voluntarily provide intelligence information to the Agency, its records are a likely repository for records of American scientists, such as MKULTRA researchers, who also perform as intelligence sources. Given that possibility, I requested additional time in which to search the DCD records for evidence of additional researchers assisting the CIA as intelligence sources in other Agency programs. The results of the search of DCD records are now available and are set forth in a supplemental classified Affidavit with supporting documentation for the Court's *in camera* review. A total of twenty (20) additional MKULTRA researchers are now known to have also assisted CIA in foreign intelligence activities separate from and in addition to their laboratory research for MKULTRA. Based upon this documentation, I believe these individuals thus meet the Court's test as intelligence sources whose identities the Director of Central Intelligence must protect from disclosure.

4. Previous CIA Affidavits filed in this litigation have demonstrated the concerns of officers primarily concerned with scientific and technical support, particularly with laboratory research, to foreign intelligence activities. While these concerns are certainly valid, they do not really focus on the clandestine operational effects which disclosure of these names would entail. My experience for approximately thirty (30) years has been in operational elements responsible for CIA's foreign intelligence activities. I recognize, having become familiar with the record of this litigation, that the Court is concerned about the role of understandings of confidentiality between CIA and its varied intelligence sources. More particularly, the Court has expressed interest in any records which document such understandings. From my experience as an intelligence officer dealing

personally with inelligence sources, including American citizens, I know that confidentiality understandings are not routinely unfailingly documented. To the contrary, for many sources, the existence of such an agreement would merely pose an additional threat to their anonymity and, thus, their personal security and safety. Accordingly, it is simply unrealistic to assume that every relationship between the CIA and a source will be evidenced by a chain of documents demonstrating that confidentiality was promised and accepted.

5. The history of the United States from prerevolutionary days to the present is sprinkled with many familiar examples of Americans performing patriotically as intelligence agents or intelligence sources. Traditionally, the most fervently kept secrets were the identities of the intelligence sources because discovery of such identities by the enemy frequently led to the sources' execution. Indeed, some like Nathan Hale have been memorialized. Documentaries concerning World War II provided repeated examples of OSS intelligence agents and sources dying under duress while refusing to disclose the identities of other intelligence sources. In light of the dire consequences flowing from public disclosure, the need for confidentiality for those involved in intelligence activities was generally dealt with as a given, an absolute. Even American scientists were presented with the philosphical imperative of secrecy for scientific and technical matters when national security was a necessary consideration. The secret development and use of radar during World War II, as well as the secret development of nuclear weapons in the Manhattan Project, further impressed Americans and, most particularly, scientists with the necessity and practice of secrecy concerning scientific activities undertaken in the interest of national security. Obviously, many of these critical activities could never have been accomplished if secrecy had been violated or the identities of the scientists known.

6. The practical role of confidentiality in intelligence activities is two-fold. First, it helps ensure the success of the activity. An intelligence activity, without confidentiality, is doomed to failure. Secondly, and of equal importance, a

lack of confidentiality for the individuals involved frequently results in harm or discomfort to them personally. The kind and degree of such damage can vary dramatically with the individual's circumstances.

7. A number of Americans have suffered significantly as a consequence of *merely* being identified as CIA intelligence sources or agents. Significantly, the accuracy of the alleged affiliation with CIA has been irrelevant, as the labeling itself has proven sufficient as an excuse for damaging acts against Americans. The following are examples of Americans who have suffered dramatic consequences for alleged affiliation with CIA:

(a) In July of 1980, Mr. Richard Kinsman's home in Jamaica was bombed and attacked with automatic weapons fire immediately after he had been publicly accused of being a CIA officer.

(b) On 7 March 1981, the body of an American Wycliffe bible translator, Mr. Chester A. Bitterman, was found in Bogota, Columbia, after being kidnapped and assassinated by a terrorist organization allegedly because he was an intelligence source for the CIA.

(c) In 1977, Reverend Armand Doll was one of ten Christian pastors and missionaries jailed in Mozambique for over a year for being "a CIA agent."

(d) In June of 1977, a Methodist missionary, Dr. Glen J. R. Eschtruth, was killed in the Congo because the rebel troops who had taken him prisoner believed that he was a CIA agent. The basis for the rebel troops' belief was a U.S. State Department acknowledgment that CIA had, in the past, used missionaries as intelligence sources.

(e) In January of 1981, the *"Covert Action Information Bulletin,"* an American publication intent upon exposing the intelligence activities of CIA, attacked the American Institution for Free Labor Development and an official of that organization, alleging that both the organization and the individual, a Mr. Mike Hammer, were affiliated with CIA. Shortly thereafter, Mr. Hammer and another official of the same organization, Mr. Mark Pearlman, were gunned down and killed by a terrorist organization while eating in a restaurant in El Salvador.

(f) In 1970, a Mr. Dan Mitrione, a USAID official in Uruguay, was kidnapped by terrorist Tupamaros and eventually murdered because of his alleged affiliation with the CIA.

(g) The United States diplomats taken hostage by the "Iranian students" in Tehran provided another example of the consequences of being identified with CIA. The individuals among the hostages whom the "students" believed to have been CIA officers were treated with considerably more severity than those who were not suspected.

(h) On 23 December 1975, Mr. Richard S. Welch was assassinated outside his home in Athens, Greece, after being labeled a senior CIA official.

8. Other Americans have suffered damage to their livelihood or reputation as a consequence of having been identified with the CIA and its intelligence activities. For example, in 1977, a Professor Michael Selzer lost his position and his tenure with Brooklyn College as a direct result of allegations by associates and relatives that he had been involved with the CIA. Other American scientists and technicians, as well as educators in other fields, have felt the consequences of alleged connections with CIA in their professional endeavors. Indeed, enough political concern became evident to cause the Congressional Oversight Committees to conduct studies of alleged CIA involvement with members of the U.S. scientific and technological communities, as well as other professions, such as journalism and religion. Simply put, not all professions regard affiliations by their members with the CIA as desirable or acceptable. The negative consequences that have befallen members of such professional societies have varied, but have frequently been negative and personally damaging to the individuals.

9. On a different level, Americans who have been publicly credited with an affiliation with CIA discovered subsequently that they were unable to obtain visas to travel in certain countries in which international professional societies were having conferences. Many of these people have also experienced the animosity that hostile foreign intelligence and security services have demonstrated towards

them for no other apparent reason than their alleged collaboration with CIA. Indeed, the negative consequences for Americans having been identified as intelligence sources are so severe that Congress has produced a draft bill which will provide for criminal sanctions against those organizations actively engaged in attempts to expose intelligence sources and agents of the United States. This, too, is in recognition of the real consequences of such identifications. Those individuals and organizations seeking to use violence against Americans seldom distinguish between the various kinds of activities the individuals may be engaged in on behalf of CIA. Rather, such terrorists are intent upon committing violence solely for the purpose of attaining recognition. Any kind of alleged affiliation with CIA which is credible will generally satisfy such individuals and organizations as an excuse for action and as a mechanism for public recognition.

10. It should also be obvious that whether the individual is witting or unwitting of his relationship with the Agency becomes irrelevant once the individual is publicly labeled as "CIA," just as it becomes irrelevant whether the "CIA" allegation is true or false as long as its basis is credible.

11. CIA cannot function effectively without a demonstrable ability to protect its intelligence sources and methods. Even an apparent inability would damage the specific secret intelligence activity so disclosed. Just as importantly, its inability to protect sources and methods would signal all intelligence sources, present and future, of the possibility of disclosures involving themselves. The end result would be an immeasurable but real diminution of the U.S. intelligence capability, a predictable consequence of declining willingness on the part of individuals who might otherwise have been willing to assist CIA.

12. Given the mutual and overlapping concerns of both sources and the Agency, I firmly believe that the confidentiality requirements of the Circuit Court's definition were intended to apply to the relationship between the Agency and the source, rather than applying only to the source. The realities of the world of intelligence lend considerable strength to this conclusion. Before setting forth these realities, however, I would note that the definition set forth in the Circuit Court decision is unlimited. It applies to any and all "intelligence sources." The CIA pleadings to date have been prepared from a perspective confined to the application of scientific research to certain intelligence problems. The CIA pleadings, thus, have not attempted to demonstrate a broad span of intelligence considerations involved in the use and protection of any and all kinds of intelligence sources and methods. The purpose of the remainder of this Affidavit is to provide more detailed information.

13. The entire arena has become technically complex and sophisticated. The United States intelligence effort is heavily involved in scientific and technical solutions to its intelligence problems. Its intelligence sources are both human and nonhuman. The nonhuman sources often involve scientific break-throughs not generally known to the scientific community. In most such cases, the very existence of such a source must be protected to assure its continued viability. In cases of nonhuman intelligence sources involving scientific principles generally known to the scientific community, the specific circumstances in which that particular intelligence source is being used must be protected to ensure the source's continued viability. The concept of negotiating a confidentiality agreement with a nonhuman, technical source is incongruous. They are, however, intelligence sources. The necessary secrecy or confidentiality in such circumstances surrounds the *fact* of the relationship between CIA and the individual intelligence source, rather than an expectation of confidentiality by the source itself.

14. With human sources, there are a variety of examples which I believe make plain the need to relate confidentiality to the relationship between CIA and the source, rather than limiting such a consideration to the individual source himself. There are a variety of situations in which a bona fide intelligence source has no expectation whatever of confidentiality. The examples which follow are real:

(a) Intelligence sources who do not realize they are intelligence sources. Such a source might, for example, be a foreign official who regularly discusses official business problems and concerns in candid terms with an old and trusted confidant who repeats such information to the CIA. If the original source in such circumstances had to be consulted because of an FOIA request, the relationship between the source and his confidant would obviously be destroyed. A useful intelligence source would likely refuse to provide any additional information and the intermediary would probably suffer some form of retaliation for having betrayed the source's trust.

(b) Intelligence sources who do not know they are reporting to the CIA. In such a case, the intelligence source might be knowledgeable of the plans and activities of a terrorist group or a narcotics smuggling ring of which he was a member. He might, in fact, believe he was reporting to an individual who was intent upon negating the efforts of CIA to learn of the plans and activities of such organizations. Should an FOIA request require that the source be contacted to discover whether or not he would insist on confidentiality, this source would obviously cease providing information. No doubt the intermediary who had passed the information along to CIA would suffer severe consequences.

(c) Intelligence sources who have been instrumental in introducing other intelligence sources into a community or environment in which they can expand their intelligence reporting capabilities. If such a source, as a result of an FOIA request, were given the option of continued confidentiality or exposure as a CIA intelligence source, and, in fact, chose to be acknowledged, such a decision would likely result in the unintentional but inevitable disclosure of the second party whose effectiveness as an intelligence source would terminate at the same time.

15. Such circumstances described above, which are neither imaginary nor uncommon, argue strongly that the Circuit Court definition should be read as placing the responsibility for the judgment as to the necessity for confidentiality with the Director of Central Intelligence in furtherance of the Director's responsibilities to protect intelligence sources and methods against unauthorized disclosures as set forth in 50 U.S.C. § 403(d)(3). To leave such a determination in the hands of the individual intelligence source would, in fact, transfer the statutory responsibility and authority of the Director of Central Intelligence to protect intelligence sources and methods to the individual sources.

/s/ Louis J. Dube

LOUIS J. DUBE

COMMONWEALTH OF VIRGINIA;
COUNTY OF FAIRFAX, to wit:

SUBSCRIBED and SWORN TO before me this 10th day of March, 1982.

/s/ Linda C. Kerns

LINDA C. KERNS, Notary Public

My Commission Expires:
July 25, 1983.

[PR 12]

### SO 4-949
22 April 1955

MEMORANDUM FOR: Chief, Security Support Division/SO
THRU : Staff [Deleted]
SUBJECT : Clearance Request—[Deleted]

1. The [Deleted] has been assigned to TSS/Chemical Division from the Security Office. Preliminary discussions between Messrs. [Deleted], and [Deleted] indicate there is sufficient background information on the person listed below to issue an appropriate clearance.

2. Mr.[Deleted] will be actively engaged in conducting scientific research and tests as directed by personnel of TSS/CD. The work will be of a sensitive nature; hence access to TOP SECRET information will be made available to him for his use.

3. It is requested that a TOP SECRET approval be issued for [Deleted] use on [Deleted]. The most expeditious handling of this request will be appreciated.

/S/ [DELETED]
Security Operations Officer
DD/P/TSS

Distribution:
- addressee—orig. & 1
- Staff C/CI—1
- TSS/SOC—2

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[PR 12]

### REPORT OF [DELETED]
27 November 1954

* * *

8. In carrying out a research program a [Deleted] it would not be essential to clear any more individual. The rest of the program could be carried out under the cover of the research grant. In this connection it would be necessary to have the research foundation write a letter to [Deleted] proposing that a group of physicians and psychologists interested in the general field of criminology and particularly the treatment and rehabilitation of sexual offenders had agreed to carry out investigations in the newer lines of therapy. [Deleted] would then obtain permission from the [Deleted] under whom he officially works and clear the project with the co-ordination of research with the [Deleted] feels that merely showing such a letter to the [Deleted] of Research would be all that would be necessary. In the future, it might be desirable to clear one or two members of his staff inasmuch as one psychiatrist is very much interested in this general area and might be able to suggest research procedures if he knew the full implications of the project.

* * *

[PR 18]

## MEMORANDUM OF AGREEMENT

1. I acknowledge the fact that because of the confidential relationship between myself and the U.S. Government, I will be the recipient of information which, in itself, or by the implications to be drawn therefrom, will be such that its unlawful disclosure or loose handling may adversely affect the interests and the security of the United States. I realize that the methods of collecting and of using this information, as well as the identity of persons involved, are as secret as the substantive information itself and, therefore, must be treated by me with an equal degree of secrecy.

2. I shall always recognize that the U.S. Government has the sole interest in all information which I or my organization may possess, compile or acquire pursuant to this understanding. No advantage or gain will be sought by me as a result of the added significance or value such information may have, due to the Government's interest in it.

3. I solemnly pledge my word that I will never divulge, publish, nor reveal either by word, conduct, or by any other means such information or knowledge, as indicated above, unless specifically authorized to do so.

4. Nothing in this understanding is to be taken as imposing any restriction upon the normal business practices of myself or my organization: i.e., information normally possessed by us or gathered in the regular course of business will continue to be utilized in accordance with our normal practices.

Signature:
/s/ [Deleted]

Date: JULY 11, 1957

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[PR 26]

DPD-8854-60
9 December 1960

MEMORANDUM FOR: Chief, Finance Division
ATTENTION : Special Contracting Officer
SUBJECT : Engagement of [Deleted] as an Independent Contractor

1. The subject individual has been engaged under oral contract and is to be charged against Allotment No. [Deleted] for use in connection with Project [Deleted]. The effective date of the oral contrct is 12 December 1960 and is continued thereafter for a period of approximately five days, subject to termination by the Agency upon actual notice.

2. The appropriate security approval for the subject's use has been obtained.

3. The subject is a United States citizen and will be used within the ZI.

4. The subject is to receive compensation in the amount of $50.00 for each day while he is away from [Deleted] on Agency business. It is contemplated that less than $300.00 will be paid under this oral contract. Thus, the Agency will not issue a Form 1099. The individual will be instructed to report compensation paid hereunder in his gross income.

5. The subject will be reimbursed for travel expenses away from [Deleted] to include ticket cost, car rental, and a fixed per diem of $15.00 per day. The fixed per diem will be paid for each full day or portion thereof that subject is away from [Deleted].

6. No commitments other than those stated above have been made to the subject.

[Deleted]
[Deleted]
DPD-DD/P

Contract Approving Officer
DPD-DD/P

cc: [Deleted]

[PR 27]

**MEMORANDUM FOR:** CHIEF/TSS
**SUBJECT** : Establishment of Subproject #35, Project MKULTRA for the Purpose of Utilizing and Financing a Cover Organization for TSS/CD's Biological Program

* * *

III. *Exploitation of Situation by TSS:* It has been generally recognized for some time that the external research activities of TSS/CD, particularly in the biological field, are sorely in need of proper cover. Our present system involves either dealing through the [Deleted] as a cut-out or dealing directly with the contractor using MKULTRA funds. It is felt now that [Deleted] usefulness will be increasingly limited in the future due to:

A. The increasing number of people who, albeit properly cleared are aware of the Agency connection with [Deleted].

B. The feeling by [Deleted] that the individuals contacting him ([Deleted] Dr. Gottlieb, etc.) do not have any cover at all, and consequently expose him to unnecessary personal risk.

C. The widespread intra-agency awareness of the nature of the relationship between [Deleted] and the Agency.

* * *

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10 January 1956

**MEMORANDUM FOR:** THE RECORD
**SUBJECT** : The conversion of Project [Deleted] from [Deleted]

1. The first year's work on this program was financed through the [Deleted] for several reasons: First, the work program at that time chiefly involved theoretical studies and the development of tools and models which presented no security hazard and involved no specific product other than unclassified informtion. Second, Mr. [Deleted] was not cleared, had to be dealt with through a cut-out, and could not be informed of our true interest. Finally, previous [Deleted] contracts on protective gear made it entirely logical to proceed for a time under an unclassified contract as cover.

2. When Mr. [Deleted] was cleared and informed of our true interests in this research, the whole scope of the project changed and it became apparent that the developments might be expected in the second year which would make it impossible to operate the program securely under the previous cover. Specifically, human experiments of a type not easily justifiable on medical-therapeutic grounds would be involved. In addition, certain items of equipment are likely to be developed which according to Mr. [Deleted] of [Deleted] could not be covertly handled under the present [Deleted] setup. It was Dr. [Deleted] general opinion that unless we were willing to clear a considerable number of people in the [Deleted] Branch of [Deleted] and to accept a lower order of security treatment of the project than we feel is necessary [Deleted] would not be able to handle the project satisfactorily.

3. For the reasons given above and because this project in a general way will begin to become involved in the subjects of interrogation and some aspects of brain-washing, TSS/DS has decided that it should be funded through project MKULTRA rather than by less secure methods.

/s/ [DELETED]
TSS/Chemical Division

Distribution:
Orig 1—TSS/CD
1—Chrone
TSS/CD [Deleted] (10 January 1956)

DRAFT
22 July 1959

MEMORANDUM FOR: THE RECORD
SUBJECT : MKULTRA, Subproject No. 95

1. The purpose of this project is twofold: (1) the psychology and personal constructs as developed by [Deleted] has had successful application in this country and for some time there has been a desire to aply this methodology to foreign cultures; and (2) [Deleted] accessibility and acceptability to [Deleted] psychologists will make it possible to secure invaluable data on [Deleted] research attitudes and personality information on researchers. MD/OSI, A&E/OTR, and SOB/DDP have expressed an interest in the results of this project and are willing to support it with requirements and technical support.

2. [Deleted] is professor of psychology at Ohio State University. He has been a fully cleared consultant to the Agency for four years and has demonstrated unusual sensitivity and perceptivity to Agency needs, particularly in the area of assessment and the psychological support of [Deleted]. He has an excellent national and international professional reputation. He is a member of [Deleted] past-president of the Division of Clinical Psychology of the [Deleted] and is the leading contender for [Deleted] . He is the [Deleted] and a consistent contributor to leading professional journals.

3. In connection with his duties as a consultant to certain of our projects, it was learned that [Deleted] was planning the [Deleted] and study outlined in the attached project proposal and has received preliminary assurance that, in part at least, he could receive the necessary support outside the Agency. However, at our request, he agreed to submit this original request to [Deleted] . Obviously, this type of grant is clearly consistent with the [Deleted] overt aims and purposes.

* * *

## PRINCIPAL RESEARCHER 40
### Subproject 6

A document from the MKULTRA files indicates that [Deleted] was given a covert security clearance for work on Subproject 6. [Deleted] was admonished not to represent himself as an employee of the CIA.

* * *

DRAFT [Deleted]
24 June 1953

MEMORANDUM FOR THE RECORD

SUBJECT: Project MKULTRA, Subproject 11

1. The scope of this research program is the investigation of the seeds of the plants Abrus precatorium and Sem. Rhynchosine phaseoloidis D.C. by chemical and biological means for the purpose of obtaining in pure form the active constitutents thereof.

2. A primary goal in the case of the Abrus seeds is the preparation of a supply of the exceeding toxic protein, abrin, which falls into the same class of substances as ricin and botulinus toxin.

3. [Deleted] has agreed, in the attached letters, to undertake this work for the Agency.

4. The total cost of this project will not exceed $11,000.00 for a period of one year ending 1 August 1954.

5. [Deleted] is cleared through TOP SECRET for Agency contracts and will take the necessary security precautions to protect its interests.

/S/ ______________________
[DELETED]

/S/ ______________________
[DELETED]
*Chemical Division, TSS*

APPROVED:
/S/ ______________________
[DELETED]

*Chief, Chemical Division, TSS*

***APPROVED FOR OBLIGATION OF FUNDS:***

***PROGRAM APPROVED AND RECOMMENDED:***

---

19 May 1964

MEMORANDUM FOR THE RECORD

SUBJECT: [Deleted]
(Formerly MKULTRA, Subproject 146)

1. The purpose of this project is to procure the services [Deleted] He has recently retired from his position as Chief, Pathology [Deleted].

2. [Deleted] is a world-renowned plant pathologist and [Deleted] his extensive background and world-wide contacts make him a valuable asset for the BW/CW efforts of TSD/BB.

3. During the first three quarters of the present contract year (beginning 1 August 1963) [Deleted] world-wide survey of with special attention to species and variety susceptibilities in various key locales. This information, along with data from the open literature, has been prepared in report form and will be used during the last quarter to formulate a basic aproach to an attack of [Deleted].

4. [Deleted] has agreed verbally to serve us on a continuing basis in the area of his specialty. It is anticipated that $5,000 per year will be required to provide reimbursement for future professional consulting and investigational services.

5. [Deleted] has free access to unpublished information, foreign and domestic, due to his reputation in the field of [Deleted]. To be associated with this Agency or with any sensitive Government project would deny this assess to him and to us. It would also be highly embarrassing [Deleted] socially and professionally. He will not continue his efforts in our behalf unless we can protect his association with the Agency.

6. [Deleted] holds Agency Top Secret approval.

/S/ ______________________
[DELETED]
TSD/BIOLOGICAL BRANCH

SL-54-410
20 May 1954

Chief, Contact Division Att: Scientific

Chief, [Deleted]

Case [Deleted]

Ref: [Deleted]

* * *

3. [Deleted] was advised that the security aspects of this project were rather sensitive from a propaganda point-of-view and that for the time being no CIA or US Government interest in such experiments should be revealed to anyone. It was pointed out to him that with the increase in interest in the biochemical approach to psychiatry and the furor caused by [Deleted] paper (on LSD-25) at the [Deleted] the investigation of the further effects of such drugs would appear to be a normal research undertaking by a group such as his. In other words, the impetus for the experiment would emanate from him personally. He agreed to this but stated that he would have to think the matter over and get some "ideas on how the thing should be operated." He expressed a desire to discuss the matter with either his Research Director [Deleted] (security status Disapproved—7 Jan 54) or with [Deleted] currently working for [Deleted] and acting as head of the [Deleted] at[Deleted] Luckily [Deleted] as primarily interested in [Deleted]. Therefore he was advised by [Deleted] that [Deleted] would be the better bet could be let in on the actual experiments but need not be told that they were CIA inspired. Meanwhile, advised him to to confer wi[Deleted] on it until he received further word from our office. A security check on [Deleted] is attached and it is requested that an ad hoc clearance on him be obtained as soon as possible. [Deleted] feels that [Deleted] has had experience in obtaining prisoner volunteers for such experiments and would be a great deal of help in setting up such a project.

4. As matters stand now:

a. [Deleted] is enthusiastic. He wants more information on the drugs. (For this it would be ideal to present him with the list of the drugs in which OSI is interested. This list was described in the 1 May 1954 conference between [Deleted].

b. He has agreed to tell no one of our plans until we advise him otherwise.

c. It appears that this plan might provide the framework for a continuing inexpensive and completely confidential research operation.

* * *

**MEMORANDUM FOR:** Deputy Director for Support

**SUBJECT:** Institute for Experimental Psychiatry

* * *

5. We are convinced that our determination, i.e., that the [Deleted] is not a university-related enitity, is proper and correct. We are of the further opinion that the flow of funds from the [Deleted] through [Deleted] to the Institute does not put this relationship in opposition to current Agency policy. However, if a reverse determination were made a most difficult problem would present itself inasmuch as we would be forced to ask for an exception to current Agency policy to allow us both to make a grant as well as making a grant through an Agency controlled mechanism in order to continue to further [Deleted] work. [Deleted] will not accept, for this work, any funds identified with the Agency. He will not do it for his own professional, ethical reasons as well as his desire to thoroughly disassociate himself from Government classified work or association inasmuch as he travels into denied areas. It is also not feasible to have this work funded by another Government agency, and [Deleted] would probably refuse to accept it in any event.

6. Because of the uniqueness, sensitivity, and previously reported in formation on the [Deleted] it is felt that you should be made aware of the above facts.

/s/ ____________________
[DELETED]
DEPUTY DIRECTOR
FOR
SCIENCES AND TECHNOLOGY

CONCURRENCES
[Deleted]
*Director of Security*

*[Deleted]*
*Director of Logistics*

---

## PROGRESS REPORT OF RESEARCH PROJECT

**University of [Deleted]**
**December 1, 1959**

*Introduction*

This is a report of progress during the period July 1, 1958, to December 1, 1959, on the above project. Funds during the period July 1, 1958 to the present have been supplied by two grants from the [Deleted] through the University Research Committee. Additional funds since July 1, 1959 have been supplied by [Deleted]. The majority of the professional time on the project has been volunteered by members of the Departments of Psychiatry and Psychology, University of [Deleted] and members of the staff of [Deleted] Hospital. Without this effective and voluntary cooperation progress on the project would have been impossible.

* * *

DRAFT [Deleted]
17 August 1960

MEMORANDUM FOR: THE RECORD

SUBJECT: Continuation of MKULTRA, Subproject 84

* * *

6. This project has been handled to date in a Government Sterile fashion and none of the personnel at [Deleted] have been witting of true sponsorship. It is contemplated that Dr. [Deleted] will be made witting of sponsorship and purpose on or about 1 September 1960 in order to guide his project along lines that will further Agency operational needs.

/s/ ______________________
[DELETED]
*Chief*
*TSD/Research Branch*

APPROVED FOR OBLIGATION
OF FUNDS:
*Research Director*

Date: 8-19-60

Attached:
*Statement of Progress*

*Distribution:*
*Original only*

---

# Supreme Court of the United States

No. 83-1075

CENTRAL INTELLIGENCE AGENCY, ET AL., PETITIONERS

*v.*

JOHN CARY SIMS AND SIDNEY M. WOLFE

ORDER ALLOWING CERTIORARI. Filed *March 5, 1984.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the District of Columbia* is granted.

Justice Marshall took no part in the consideration or decision of this petition.

# RESPONDENT'S

# BRIEF

Office - Supreme Court, U.S.
FILED
AUG 25 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1075 and 83-1249

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1984

CENTRAL INTELLIGENCE AGENCY,
and WILLIAM J. CASEY,
*Petitioners-Respondents,*

v.

JOHN CARY SIMS and SIDNEY M. WOLFE,
*Respondents-Petitioners.*

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF FOR RESPONDENTS IN No. 83-1075 AND FOR PETITIONERS IN No. 83-1249

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## QUESTIONS PRESENTED

### I. (in No. 83-1075)

Are scientific researchers, engaged in research in the United States more than twenty years ago, "intelligence sources" within the meaning of 50 U.S.C. § 403(d)(3) and therefore exempt from disclosure under Exemption Three of the Freedom of Information Act?

### II. (in No. 83-1249)

Did the court of appeals err by affirming, without explanation, the district court's decision to permit the Central Intelligence Agency to withhold the names of institutions at which MKULTRA research was conducted, even though the institutions themselves are not "intelligence sources" within the meaning of 50 U.S.C. § 403(d)(3), and even though the CIA failed to present any evidence to show that disclosure of the institutions would lead to identification of researchers?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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Nos. 83-1075 and 83-1249

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CENTRAL INTELLIGENCE AGENCY,
and WILLIAM J. CASEY,
*Petitioners-Respondents,*

v.

JOHN CARY SIMS and SIDNEY M. WOLFE,
*Respondents-Petitioners.*

---

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

## BRIEF FOR RESPONDENTS IN No. 83-1075 AND FOR PETITIONERS IN No. 83-1249

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## INTRODUCTION

This action under the Freedom of Information Act, 5 U.S.C. § 552, seeks access to records of the Central Intelligence Agency ("CIA") which identify the researchers and institutions involved in the MKULTRA project — the CIA's research program, conducted in the late 1950s and early 1960s, into behavioral modification techniques and mind-altering drugs. There are three points which merit emphasis at the outset because, taken together, they provide the cornerstone of despondents' case before this Court.[1]

First, this is a case arising under the Freedom of Information Act ("FOIA") — not the National Security Act. This difference is vital because the CIA asks this Court to construe the term "intelligence source" in 50 U.S.C. § 403(d)(3) in isolation, forgetting that its only relevance is that it is incorporated into the FOIA by operation of Exemption 3 of the FOIA. 5 U.S.C. § 552(b)(3). Thus, although we agree with the CIA that the meaning of the term "intelligence source" is the principal issue before the Court, that term must be construed in a manner consistent with the dictates of Exemption 3 and the other provisions of the FOIA.

Second, the CIA studiously avoids focusing on the facts of *this* case. Aside from a perfunctory statement of the case, virtually all of the illustrations used by the CIA in its brief have nothing to do with the information that respondents seek. On the contrary, the facts of this case are highly unusual, inasmuch as the MKULTRA program involved nothing even remotely resembling the sort of intelligence activities to which the CIA alludes throughout its brief. Rather, MKULTRA entailed entirely academic research conducted primarily by college professors in the United States, almost half of whom were unaware that they were working for the CIA. Indeed, it is precisely because the underlying activities were so far removed from the basic mission of the CIA that the Agency has steadfastly refused to defend this case on the basis of the FOIA's national security exemption, 5 U.S.C § 552(b)(1).

Third, throughout its brief the CIA persists in suggesting that the court of appeals' definition of "intelligence source" stands as a hard and fast, bright-line test of what constitutes an intelligence source, to be applied as if it were a statutory definition. That is not the case. As the court of appeals emphasized in *Sims I*, it was in response to the CIA's urging that the court sought to formulate a general test to guide the courts. Thus, in holding that the term "intelligence source" had to be construed in a manner that would "focus on the practical necessity of secrecy," the court laid down guidelines which would have to be applied with an eye toward the CIA's "functional" needs, not an ironclad, inflexible definition, as the CIA contends.

---

[1] In this brief, Mr. Sims and Dr. Wolfe, respondents in No. 83-1075, and petitioners in No. 83-1249, will be referred to as "respondents." The petitioners in No. 83-1075, which are also the respondents in No. 83-1249, will be labeled "petitioners", "CIA" or "the Agency."

## STATEMENT

### A. The MKULTRA Project

Between 1952 and 1966, the CIA financed a program of experimental, laboratory and library research devoted primarily to behavior modification techniques and mind-altering drugs. The projects, all of which were conducted in the United States, were known collectively as MKULTRA. The research was essentially academic in nature, ranging from drug experiments on individuals to laboratory research on deterioration of petroleum products, from the synthesis of mind-altering drugs to the preparation by a magician of a manual on sleight-of-hand techniques.

Many of the scientists were funded through a front organization, the Society for Investigation of Human Ecology. As a result, many of the projects' researchers — not to mention the major universities and other institutions at which they were employed, which were often not even advised that the contracts had been awarded — were unaware of the CIA's involvement.

Revelation of the existence of the MKULTRA program in 1975 provoked considerable controversy about government abuse of scientific research, about CIA use of campus facilities, and about scientists' abuse of human experimental subjects. Although the general areas covered by the project have been discussed at Congressional hearings, in television news specials, and in various publications, most of the details are as yet unknown. The reason for this is that in 1973, departing CIA Director Richard Helms arranged for the destruction of all known files pertaining to MKULTRA, in order to prevent it from being "misunderstood." Marks, *The Search for the Manchurian Candidate* 205 (1979). According to the special Senate Committee which was established to inquire into this and other questionable CIA activities:

> The destruction of the MKULTRA documents made it impossible for the Select Committee to determine the full range and extent of the largest CIA research program involving chemical and biological agents [and] prevented the CIA from locating and providing medical assistance to the individuals who were subjects in the program.
>
> Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Final Report: Foreign and Military Intelligence*, S. Rep. No. 755, 94th Cong., 2d Sess. 404 (1976). *See also id.* at n. 75.

Although the CIA followed Helms' instructions, its archivists failed to find certain MKULTRA records that had been misfiled. For the most part, the surviving documents are research contracts, vouchers, bills, and similar materials concerning the initiation and financing of the projects. Apart from a few progress reports used to justify requests for more money, and occasional substantive references in the contracts that permit educated guesses about the basic objectives of certain subprojects, the documents are singularly uninformative about the matters of greatest public interest — what did the researchers do, what were their findings, what were the side effects of the work and who was victimized. Indeed, the CIA, following what it described as a "careful review" of the documents, found that they contained no information which required "continued protection," and accordingly declassified them in 1977. Pet. App. 90a. Because the leading CIA figures in the program have either refused to discuss the details or

claimed poor memory, the only remaining avenue to investigate MKULTRA is to identify the researchers, talk to them, and then to undertake further independent analysis to determine what they did.

### B. Proceedings Below

#### 1. *Sims I*

On August 22, 1977, respondents John Cary Sims, a lawyer, and Sidney M. Wolfe, M.D. the director of the Public Citizen Health Research Group, made a request to the CIA under the FOIA to release records identifying both the principal researchers ("PRs") for all MKULTRA subprojects and the institutions at which each PR conducted his or her work. Although the CIA initially refused to honor the request, citing Exemptions 3 and 6, respondents acceded to the CIA's suggestion that further action be deferred until it had had an opportunity to contact the institutions (but not the PRs) to learn whether they would object to their identification.

On June 13, 1978, the CIA sent respondents a final response refusing to provide the names of any PRs. It did include alphabetical lists of the institutions at which the researchers conducted their work, including subproject numbers for each institution.[3] From those lists, the CIA deleted the names of approximately one-third of the institutions, which either did not respond to the CIA's two letters or asked for anonymity. In no instance did the CIA even consider that, by identifying an institution, it might lead to identification of the researcher who worked there; it simply acceded to the wishes of each institution in deciding whether to identify that institution.

Respondents filed this FOIA action on November 30, 1978. The CIA initially asserted two grounds for withholding the identities of the PRs and their institutions. First, it claimed that the identities were exempt pursuant to Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), which protects matters "specifically exempted from disclosure by statute," if the other statute either leaves the agency no discretion on withholding, or sharply confines the agency's discretion. The CIA contended that because the MKULTRA work was of assistance to the CIA's intelligence-gathering function, the PRs and the institutions were exempt from disclosure as "intelligence sources" within the meaning of 50 U.S.C. § 403(d)(3). Second, the Agency asserted that identification of the PRs would constitute "a clearly unwarranted invasion of [their] personal privacy," and thus nondisclosure of the researchers' identities was authorized by Exemption 6 of the FOIA. 5 U.S.C. § 552(b)(6).[3]

---

[3] The lists are reproduced as an Addendum to this brief.

Although its briefs and affidavits were replete with references to national security, and although the district court, concerned about the validity of the Agency's other defenses, repeatedly urged the CIA to consider invoking the national security exemption, 5 U.S.C. § 552(b)(1), the Agency declined to do so. It also rejected the district court's repeated suggestions that it correspond directly with the PRs, as it had with the institutions, to learn whether they objected to disclosure and whether they had expected that their identities would be kept secret. The CIA claimed that such correspondence, even if not revealed to respondents, would itself be an invasion of the privacy of those PRs who were unaware of their CIA connection.

Finally, in a further effort to afford the CIA protection from the reach of the FOIA, the district court hypothesized that the CIA might have implicitly or explicitly promised confidentiality to the PRs, and invited the parties to brief the question of whether the CIA might be contractually bound not to release their identities, and whether the FOIA, which was passed after these contracts were made, could constitutionally abrogate the Agency's secrecy obligations. The CIA, however, declined to rely on that theory, inasmuch as it would also prevent the Agency from releasing the identities if it chose to do so. *See* Pet. App. 71a, 74a-75a.

On cross-motions for summary judgment, the district court rejected the CIA's claims in two opinions. Pet. App. 66a-70a and 73a-82a. The court reasoned that the CIA had failed to establish that these researchers or institutions were "intelligence sources" within the meaning of § 403(d)(3), and that the CIA's proposed definition of the statutory term — any "contributor to the intelligence process" — was far too broad to be acceptable. Pet. App. 78a. In rejecting the CIA's approach, the court ruled that persons who conducted academic research for purposes "collateral to the business of intelligence" were not "intelligence sources" within the meaning of the term. Pet. App. 79a.

On appeal, the CIA offered a new definition of "intelligence source", *i.e.*, any individual or entity that provides the CIA with "substantive information having a rational relation to the nation's external national security." Pet. App. 46a. The court of appeals, however, rejected this proposal as too broad. Rather, it said, in light of the FOIA's objective of ensuring that the matters exempted from disclosure be defined by legislative judgments rather than unreviewable executive discretion, the "intelligence sources" exemption should be construed in accordance with the purpose of § 403(d)(3). Taking up the CIA's request for a definition of the statutory phrase, the court of appeals focused on the "practical need" for secrecy in order to protect the sources and produced the following working definition of "intelligence sources" designed, in large part, to deal with the case before it:

> an intelligence source is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.
>
> Pet. App. 50a.

The case was thus remanded to the district court for application of the definition to the identities at issue. Judge

---

[3] Both the district court and the court of appeals rejected the Agency's privacy claim, Pet App. 53a-58a, 80a-82a, and the issue was not presented in the petition for a writ of certiorari.

Markey agreed that the CIA's proposed definition "sucks into which secrecy's maw too many sources of too many kinds of information," and wholeheartedly endorsed the majority's construction of § 403(d)(3). Pet. App. 61a. He dissented only on the necessity of a remand, because in his view the CIA had steadfastly refused to seek or present the kind of evidence which would be necessary on remand, Pet. App. 62a, and because it was plain to him that these PRs and institutions were not "intelligence sources" and hence their names should be released immediately. Pet. App. 63a-64a.

### 2. *Sims II*

On remand, the CIA extensively searched its files for documentary evidence bearing on any explicit or implicit promises of confidentiality made to any PRs. However, it still declined to contact either the PRs or those CIA employees who had been directly involved in the MKULTRA program to support its defense. Instead, it relied principally on two affidavits from M. Corley Wonus, a current CIA official who had no personal knowledge of any aspect of MKULTRA. App. 15-28. The Agency's submissions presented general arguments about the importance of protecting the confidentiality of intelligence sources, a matter which has never been disputed, and made claims that the evidence showed that both the CIA and the PRs desired confidentiality. The Agency also argued in its briefs that it was unnecessary to show that a particular researcher wanted anonymity to qualify as an intelligence source, so long as the CIA could show that it had tried to keep the researchers' activities secret for its own purposes — *i.e.*, to prevent other nations from learning the research topics on which the CIA was working. In this regard, the CIA did not address, much less explain, the apparent anomaly of invoking Exemption 3 to protect its secrecy interests instead of asserting Exemption 1, which is specifically tailored to protecting national security information.

Because the CIA was unwilling or unable to produce evidence showing a need for confidentiality for most of the PRs, the district court ruled that almost none of the MKULTRA researchers were intelligence sources. First, it reasoned that unless the CIA had in fact provided the PRs with explicit or implicit guarantees of confidentiality, it could not be said that such a guarantee was needed in order to secure information from the researcher. Although the record revealed ample evidence of a desire on the part of the *CIA* to keep the program secret, it revealed "very little evidence that any of the researchers themselves desired confidentiality." Pet. App. 23a. Indeed, the evidence revealed numerous cases before, during and after MKULTRA in which the CIA had had to take steps to stop PRs from revealing the CIA's involvement in their research, but not the opposite. Pet. App. 26a; App. 57, 60. Moreover, it was obvious from the nature of many of the subprojects that they could readily be explored without a guarantee of confidentiality.[*]

However, for six PRs there was evidence demonstrating that the PR had told the CIA that he was concerned about confidentiality, or the evidence otherwise suggested an implicit guarantee of confidentiality. The district court concluded, and respondents did not disagree, that the CIA had proven that these six PRs were intelligence sources; the court therefore allowed their names to be withheld. Pet. App. 26a. However, as respondents stressed, and as the district court observed: "The absence of such evidence with respect to almost all other researchers stands in stark contrast." Pet. App. 26a.

Despite its ruling, the district court did not order the release of the identities of the remaining PRs or of their institutions. Instead, it allowed the CIA to submit voluminous additional *in camera* affidavits and supporting documents, and it conducted four *ex parte, in camera* hearings attended only by CIA officials and their counsel. Based on this new evidence, the district court found that an additional 41 PRs had been engaged in other work for the CIA which made them intelligence sources, and allowed the CIA to withhold their identities because their connection with MKULTRA might lead to the exposure of their other CIA work. Pet. App. 28a-31a. The court also accepted the argument made in the CIA's briefs, unsupported by any affidavits or other evidence and indeed undermined by the Agency's disclosure of two-thirds of the institutions, that, although the institutions were not themselves intelligence sources, identification of an institution could lead to disclosure of a PR. Accordingly, the court allowed the CIA to withhold the identity of any institution whose researcher's identity was exempt from disclosure. Pet. App. 27a.

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[*] The district court cited several examples. Pet. App. 25a-26a. Others included a magician who was paid to write a manual on sleight-of-hand techniques; research on aerosol delivery systems; a study of the relationships between molecular constitution and biologic response; a study of sleep and insomnia; investigation of the absorption of alcohol into the blood; reviews of published literature about handwriting analysis and similar subjects; and a study of ways to obtain information from soil. *See generally* Analysis of MKULTRA Principal Researcher Files, submitted with Plaintiffs' Motion for Summary Judgment, June 10, 1981.

Both sides appealed. The court of appeals did not discuss the issue of the institutions, thus implicitly affirming the district court in that regard. With respect to the PRs, however, it reversed the district court in every respect and remanded the case to permit application of the *Sims I* definition, as refined in *Sims II*. Pet. App. 9a. Specifically, the court ruled that the key issue in deciding whether a PR was an intelligence source was the "kind" of information provided. Pet. App. 4a-5a. The fact that confidentiality was desired by a researcher would be probative of the need for secrecy, but could not be conclusive, both because a particular researcher might be either atypically sensitive or atypically insensitive to public disclosure and because the CIA might collude with a researcher to manufacture requests for, or promises of, confidentiality. Pet. App. 6a-7a. Accordingly, the district court was directed to reconsider the status of all PRs.

Judge Bork dissented in part. He disagreed with the majority's readiness to discount an express promise of confidentiality, and he declined to join in a phrase in the majority opinion which attributed the CIA's resistance to disclosure to a fear of public outcry about MKULTRA. Finally, without discussing the availability of Exemption 1, he expressed "some doubt" about the *Sims I* definition of intelligence source because he feared that the CIA might not be able to protect the secrecy of its interest in certain topics.

Both sides petitioned for rehearing. The CIA sought reconsideration of the ruling in *Sims I* as well, suggesting rehearing en banc. Respondents sought only clarification and an express ruling on the status of the institutions. The court denied both petitions.

## SUMMARY OF ARGUMENT

1. The principal issue in this case is whether scientists who conducted research in the United States for the CIA more than twenty years ago are "intelligence sources" whose names may be withheld under Exemption 3 of the FOIA and 50 U.S.C. § 403(d)(3). The Agency makes no claim that release of that information would damage the national security and hence could be properly classified. Instead, petitioners urge this Court to adopt a virtually limitless and judicially unreviewable definition of the term intelligence source, in direct contravention of (a) the basic disclosure goal of the FOIA, (b) the narrowing purpose of the 1976 amendment to Exemption 3, (c) Congress' rejection of virtually the same plea when it overturned this Court's decision in *EPA v. Mink*, 410 U.S. 73 (1973), and (d) the principal method by which Congress sought to control improper agency withholdings — *de novo* judicial review.

The CIA argues that, as used in 50 U.S.C. § 403(d)(3), an "intelligence source" is any person who provides the CIA with "intelligence information"; this term, in turn, is defined by the Agency as any information which the CIA reasonably believes it needs, Br. at 28, a formulation even broader than that which it proposed in the court of appeals. Respondents agree that an intelligence source is one who provides the CIA with a certain kind of information, namely intelligence, but that does not mean that any information reasonably desired by it constitutes "intelligence." The courts below properly rejected the CIA's concept of an intelligence source as overly broad, and instead formulated a definition which correctly distinguished between those who warranted protection and those who did not.

The major flaw in the CIA's argument is that it views § 403(d)(3) in isolation, without reference to the policies of the FOIA, to the broader statutory scheme of which § 403(d)(3) is a part, or to the unique facts of this case. Thus, § 403(d)(3) is relevant only insofar as it allows the CIA to withhold records under the FOIA, which requires disclosure of all matters not explicitly allowed to be kept secret. Here withholding is pursuant to Exemption 3, which was originally construed to include statutes affording agencies open-ended discretion to withhold records. *Federal Aviation Admin. v. Robertson*, 422 U.S. 255 (1975). However, Congress overruled this construction by amending the exemption to include only statutes in which Congress itself has made the basic decisions about which matters should be disclosed and either eliminated or narrowly confined the Agency's discretion to decide whether particular records should be withheld. Accordingly, in order to apply § 403(d)(3) to authorize withholding under the FOIA it is necessary to construe it in a manner which would make it an Exemption 3 statute. Yet to give § 403(d)(3) the breadth urged by the CIA would preclude it from being an Exemption 3 statute, a result which the CIA plainly does not desire.

The Agency also severs § 403(d)(3) from its own legislative history. Although Congress recognized that intelligence sources would be a diverse lot, the CIA's intelligence mission was intended to focus principally on gathering information about foreign countries which could not be obtained if the targets of the inquiry knew of the CIA's efforts. Congress was also aware that the sources of this "intelligence" would face "deadly peril" if their roles were revealed. To protect the identities of such covert sources, Congress mandated in § 403(d)(3) that the CIA protect "intelligence sources and methods from unauthorized disclosure." Scientific researchers like those involved in this case simply do not present the problem that Congress sought to avoid.

The court of appeals, asked by the CIA to formulate a definition of intelligence sources, defined the term to include providers of information, needed for the intelligence function, which the CIA "could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it." That definition constitutes a workable formula for protecting those whose safety might be imperiled by disclosure, while at the same time enabling the courts to continue to conduct a *de novo* review of agency withholding claims, as the FOIA requires. The CIA recognizes the need to draw some line, but argues that the Agency alone should perform that function. That approach would transform § 403(d)(3) into a standardless non-disclosure statute of the sort which Congress intended to exclude from Exemption 3 by the post-*Robertson* amendment.

In order to persuade the Court to reject the court of appeals' formulation as unduly narrow, the CIA asserts that it would result in the devastation of the intelligence-gathering function. The CIA's analysis is flawed because it both misconstrues the court of appeals' formulation and ignores the many other defenses the CIA can mount against disclosure, principally Exemption 1 of the FOIA which provides blanket protection for information whose disclosure would harm national security.

The CIA's final objection is that the availability of judicial review itself threatens its mission because it creates a perception on the part of potential intelligence sources that their identities cannot be fully protected. But this perception cannot be avoided without exempting the CIA from the core requirement of the FOIA, *de novo* judicial review of agency withholding. Indeed, even the withholding of classified national security information, such as troop movements and deployment of nuclear weapons, is subject to judicial review as a result of the 1974 amendment to Exemption 1 which overruled *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1974). Moreover, since Congress has repeatedly refused CIA requests for exemption from judicial review under the FOIA, this Court may not grant the CIA that which Congress has refused it.

2. The cross-petition for certiorari challenges the CIA's refusal to identify the institutions at which the researchers who are found to be intelligence sources performed their work, unless the institutions expressly consented. The courts below allowed withholding on the theory that, although the institutions are not themselves sources, their disclosure could "lead to" identification of researchers who are. But the CIA failed to submit any evidence to support this "lead to" argument, although the FOIA squarely places the burden on the agency to justify withholding. Moreover, the Agency had previously identified some two-thirds of the institutions and the subprojects performed there without any concern that such disclosure might lead to identification of the researchers; yet it offered no explanation for the glaring contradiction.

## ARGUMENT

### I. DOMESTIC SCIENTIFIC RESEARCHERS WHO WERE PAID BY THE CIA TO DO LABORATORY AND LIBRARY RESEARCH MORE THAN TWENTY YEARS AGO ARE NOT "INTELLIGENCE SOURCES" WHOSE NAMES ARE EXEMPT FROM DISCLOSURE UNDER 50 U.S.C. § 403(*d*)(3) AND EXEMPTION 3 OF THE FOIA.

### *A. The FOIA Requires That Statutory Exemptions Such as Section 403(d)(3) Be Construed Narrowly.*

Any attempt to comprehend the scope of an exemption from mandatory disclosure under the FOIA, such as § 403(*d*)(3), must begin with an understanding of the statutory scheme of disclosure embodied in the FOIA itself. The FOIA was enacted because Congress was dissatisfied with the failure of federal agencies to disclose information under the vague standards of section 3 of the Administrative Procedure Act, which allowed agencies to withhold data "requiring

secrecy in the public interest." *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979).

Congress responded with the FOIA, which established a broad mandate for disclosure, subject to nine Congressional exemptions. The Act requires that all matters be made public "unless *explicitly* allowed to be kept secret by one of the exceptions . . . ." S. Rep. No. 813, 89th Cong., 1st Sess. 15 (1965) (emphasis added). Courts are directed to review claims of exemption *de novo*, and "the burden is on the agency to sustain its actions." 5 U.S.C. § 552(a)(4)(B). Moreover, the exemptions "must be narrowly construed." *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Consequently, this Court has "consistently recognized that the basic objective of the Act is disclosure." *Chrysler Corp. v. Brown*, *supra*, 441 U.S. at 290. *See also Department of Air Force v. Rose*, *supra*, 425 U.S. at 361 ("the basic policy [is] that disclosure, not secrecy, is the dominant objective of the Act").[9]

This case involves Exemption 3, which allows withholding on the basis of other, specific nondisclosure statutes. As originally enacted, Exemption 3 included any matters which were "specifically exempted from disclosure by statute." This provision was broadly construed in *Federal Aviation Admin. v. Robertson*, 422 U.S. 255 (1975), where this Court ruled that Exemption 3 included a statute with the kind of open-ended agency discretion that the CIA argues is embodied in § 403(*d*)(3). *Compare id.* at 263-267 *with* CIA Br. at 22-24.

Congress promptly responded to *Robertson* by amending the FOIA to narrow Exemption 3 considerably. Section 5(b), Government in the Sunshine Act, Pub. L. 94-409 (1976). Rather than allowing an agency to withhold records pursuant to *any* Congressional enactment permitting secrecy, the new exemption includes only a statute which

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[9] The CIA's brief makes repeated deprecating references to "what the court of appeals considered to be the pro-disclosure 'spirit' of the FOIA." Br. at 12, 22, 23. Contrary to the implication of these references, the pro-disclosure philosophy of the statute appears on its face, in its legislative history, and in the decisions of this Court.

> (A) requires that the matters be withheld from the public in such a way as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Congress believed that the construction of Exemption 3 in *Robertson* created a "gap" in the FOIA since it gave the power to the agencies, rather than to Congress, to make the policy decision about whether a particular record should be disclosed. H.R. Rep. No. 94-880, 94th Cong., 2d Sess. 23 (1976). Thus, the express purpose of the 1976 amendment was to overrule the open-ended secrecy rule of *Robertson*. H. R. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. 25 (1976). The new Exemption 3 removed agency discretion to keep records secret. Instead, it allowed withholding only pursuant to those statutes in which the legislative branch, rather than the executive branch, had not only made the basic policy decision concerning the dangers of releasing certain data, but also provided a formula ("particular criteria" or "particular types" of matters) pursuant to which both the agency and reviewing courts could decide whether disclosure in any instance would pose the hazard that Congress foresaw. *Lee Pharmaceuticals v. Kreps*, 577 F.2d 610, 614-616 (9th Cir. 1978); *American Jewish Congress v. Kreps*, 574 F.2d 624, 628-629 (D.C. Cir. 1978).

The committee reports on the 1976 amendment listed several statutes that would be included under it. However, contrary to the claim made in the CIA's brief, at 15, nowhere did Congress specify that the new Exemption 3 incorporated 50 U.S.C. § 403(d)(3) as a withholding statute. The 1974 committee reports cited at page 15 of the CIA's brief are singularly unhelpful — they did indeed say that § 403(d)(3) was included in Exemption 3, but referred only to the old Exemption 3 language which was construed in *Robertson*. The 1976 report cited by the Agency has greater bearing, but is actually contrary to the CIA's position because it proposed adding language, ultimately not adopted, which it described as necessary to "clarify" that § 403(d)(3) would be included within the exemption.*

The only basis for treating § 403(d)(3) as an Exemption 3 statute would be a determination that, as properly construed, that section provides an explicit formula which meets the 1976 standard because it eliminates entirely (subpart A), or narrowly confines (subpart B), the Agency's discretion to decide whether records should be withheld. The statute plainly does not fall within subpart (A), inasmuch as it does not require withholding in such a way as to eliminate all discretion. Nor does it establish "particular criteria for withholding" under the first clause of subpart (B). Thus, § 403(d)(3) can only be included if it refers to "particular types" of information "to be withheld" — the second clause of subpart B.

In these circumstances, it was scarcely "fundamentally misconceived", as the CIA contends, Br. at 22, for the court of appeals to construe § 403(d)(3) in light of the dictates of the 1976 amendment to Exemption 3. Absent such a construction, the provision would be too expansive and too discretionary to pass muster under Exemption 3, and thus the CIA would not be able to rely on § 403(d)(3) to withhold the names of any intelligence sources. Instead, it would be required in each case to establish that disclosure of the name would damage the national security and would therefore be exempt pursuant to Exemption 1.

The CIA nevertheless argues for a construction of the statute which ignores the intent of the post-*Robertson* amendment and looks only to the legislative history of § 403(d)(3) which, as shown in the next section of this brief, is not very illuminating. But it is fundamental law that the courts may properly take into account a later development in "an evolving pattern of regulation" — here, the legislative scheme for public access to government information — in deciding the meaning of unclear language in part of the scheme previously enacted. *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274, 291-292 (1960), *quoted in NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175, 194 (1967); *Hunter v. Erickson*, 393 U.S. 385, 388 (1968). Thus, the basic proposition that FOIA exemptions "must be narrowly construed," *Department of Air Force v. Rose, supra*, fully applies to statutes which become exemptions by way of Exemption 3. More specifically, section 403(d)(3) should be construed in a manner consonant with the congressional formula on which the 1976 amendment to Exemption 3 was premised, and in a manner which would "fulfill Congress' intent to close the loophole created by *Robertson* . . . ." *Founding Church of Scientology v. NSA*, 610 F.2d 824, 829 (D.C. Cir. 1979).

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* To understand the genesis of the language ultimately substituted for Exemption 3, compare the House Government Operations Committee Report, H. R. Rep. No. 94-880, 94th Cong., 2d Sess., Part I at 9 (1976) (includes only statutes that require withholding) with the House Judiciary Committee Report cited by the CIA, *id.*, Part II at 15 (includes statutes that "require or permit" withholding). The enacted statute excludes the "or permit" language and substitutes for it subpart (B) requiring particular criteria or particular types of information. *See Lee Pharmaceuticals v. Kreps*, 577 F.2d 610, 615-616 nn. 4 and 8 (9th Cir. 1978).

### B. *Section 403(d)(3) Was Not Intended to Bar Disclosure of Researchers Like the MKULTRA Scientists.*

The legislative history of § 403(d)(3) fails to buttress, and even undercuts, the CIA's expansive construction of the term "intelligence sources." The framers of the National Security Act of 1947, 50 U.S.C. § 401 *et seq.*, were primarily concerned with the coordination and division of responsibility among the various departments after the national security and national defense functions were reorganized in the aftermath of World War II. 50 U.S.C. § 401. During the War, the Office of Strategic Services, the CIA's predecessor agency, had been barred from operating in the Western Hemisphere and was denied access to intelligence obtained by other bodies.

Titles I and II of the Act, 61 Stat. 496-507, create the various military and security agencies and allocate the various defense and security functions among them. Section 102, 50 U.S.C. § 403, creating the CIA, provided in subsection (d)(3) that although the Agency would correlate, evaluate, and disseminate intelligence, other agencies would

continue to share in that responsibility. It then added that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." The section does not, on its face, require the withholding of any information but simply assigns to the CIA (rather than to each individual agency) the task of protecting "intelligence sources" for all agencies from unauthorized disclosure. The fact that § 403(d)(3) was written as an organizational rather than information-withholding statute perhaps explains why its legislative history contains no hint as to what the term was meant to cover.

Recognizing the absence of legislative history on the meaning of intelligence sources, the CIA instead relies on remarks by members of Congress and intelligence officials about the intelligence which was required to carry on the CIA's mission and the means by which it would be obtained. Because the scope of the intelligence contemplated by Congress was highly diverse, the CIA argues, the term "intelligence sources" should be equally diverse — broad enough to cover even such MKULTRA researchers as the scientists who conducted cancer research and laboratory studies concerning the deterioration of petroleum products or the educator who studied the usefulness of mechanization in foreign language instruction.

But contrary to the CIA's argument, the very remarks upon which it relies, Br. at 18-19, suggest that Congress had a very different sort of "intelligence source" in mind when it enacted § 403(d)(3):

- Information would be gathered about the armed forces, industries, race, religion and "other related aspects" of a possible enemy (Admiral Nimitz).
- Americans who traveled around the world would report what they see and hear (Allen Dulles).
- "[A]ll possible data pertaining to the foreign governments or the national defense and security" would be used (General Vandenberg).
- The agency would receive "information coming

> from all over the world through all kinds of channels." (Rep. Wadsworth).

These are the "intelligence sources" Congress had in mind. Plainly, their ability to provide reliable information to the CIA depended on foreign ignorance that they were doing so. In order to recruit them, it was necessary to guarantee that their CIA connection would be kept confidential. They are the "sources" of which Messrs. Dulles and Vandenberg spoke, CIA Br. at 20, and of which this Court wrote in *Snepp v. United States*, 444 U.S. 507, 512 (1980), who would "close up like a clam" if they could not be guaranteed confidentiality and who would face "deadly peril" if their identities were revealed. They are, however, a far cry from the alleged "intelligence sources" involved in this case. The scientific researchers — not to speak of the magician who was engaged to write a manual on sleight-of-hand techniques — did not depend on confidentiality to gain access to information; few of them sought or received pledges of confidentiality, and they scarcely faced peril from identification — or face it today if they are even alive thirty years later.

Indeed, the legislative history suggests that Congress believed that the CIA's intelligence sources would not extend to scientific researchers working within the United States. Thus, Representative Holifield reassured his colleagues as follows:

> I want to impress upon the minds of the Members that the work of the Central Intelligence Agency, as far as the collection of evidence is concerned, is strictly in the field of *secret foreign intelligence — what is known as clandestine intelligence*.
>
> 93 *Cong. Rec.* 9430 (1947)(emphasis added).

Neither Representative Holifield, nor the rest of the Congress that heard his remarks and passed the National Security Act, would have expected the CIA to be paying domestic scientific researchers to study extrasensory perception, the placebo effect, or blood groupings as a means of identification; nor did they contemplate that such researchers would be sources of "intelligence" within the meaning of the Act.

Accordingly, there is no basis in the legislative history of § 403(d)(3) for believing that Congress intended to include scientific researchers of the sort used for MKULTRA as intelligence sources.

### C. *The Court of Appeals' Formulation Provides a Sound Basis for Distinguishing Intelligence Sources From Other Persons Upon Whom the CIA Relies.*

The courts below recognized that the sort of persons that Congress had in mind, and whom the CIA's brief consistently invokes when warning of the dangers of the court of appeals' formulation, are unquestionably intelligence sources protected from unauthorized disclosure. Undercover agents, business, professional and vacation travelers who are debriefed by the CIA on their return from abroad, journalists who talk to the CIA about their contacts — all are obviously intelligence sources as Congress used that term in § 403(d)(3). Yet Congress used the term "intelligence" source, not "information" source, and accordingly the issue before the Court is, how to distinguish between these obvious examples of the "intelligence" sources that Congress had in mind, and others who are sources of information, but not "intelligence sources."

The court of appeals' formulation provides a sound basis for making this distinction:

> [A]n "intelligence source" is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

The rule is extrapolated from the characteristics of the traditional sort of intelligence source, whose disclosure was the hazard that Congress sought to prevent. These sources could not obtain information useful to the CIA unless their contacts were kept ignorant of the source's CIA connection. And the CIA would obviously be unable to obtain reliable information from them without promising that their relationship with the CIA would remain confidential. The court of appeals thus established a formula distinguishing among sources of information who were obviously not intelligence sources and those who were, by taking account of the implicit Congressional objective, that is, the practical need for secrecy to protect the sources of intelligence, which Congress had before it when it enacted the National Security Act.

Although in some parts of its brief the CIA appears to argue that *any* limitation on the scope of the term "intelligence source" would threaten its ability to perform its intelligence mission, an argument discussed *infra* at 33-36, elsewhere it acknowledges that the statutory term has some outer boundaries. The CIA now recognizes the need to distinguish between those who are "intelligence sources" exempt from disclosure and those who are not, but its solution is legally unsound.

Thus, it now concedes (Br. at 36), repudiating its contrary position in the court of appeals, Pet. App. 46a, that § 403(d)(3) would not allow it to withhold the fact that it has obtained information from the *New York Times* and *Pravda*. According to the CIA's new position, the *Times* and *Pravda* are still admitted to be within the literal terms of its proposed definition of "intelligence source," but the CIA should be trusted to exercise its discretion not to invoke § 403(d)(3) because revelation of its use of those publications is "innocuous." Br. at 36.

But the CIA's explanation of what makes disclosure innocuous — that the Agency's consultation is commonly assumed to occur — contains a missing premise which severely undermines the Agency's attack on the decisions below. The CIA's confirmation of the public assumption about its use of these journals is innocuous only because public knowledge of this fact does not interfere with the benefit which the Agency derives from the journals. In other words, because confidentiality of the CIA's connection with the journals is not needed for the intelligence process,

disclosure of that connection is innocuous and need not be prevented. The same analysis would apply to other sources which would not lose their usefulness even if disclosed.

But this approach undercuts the CIA's position in two very important ways. First, because it implies that § 403(d)(3) permits the CIA to decide when a particular person is an "intelligence source," rather than defining with particularity the matters to be withheld, § 403(d)(3) becomes the sort of open-ended discretionary withholding statute which is now excluded from the ambit of Exemption 3(B).

This discretionary approach to disclosure would sweep within § 403(d)(3) many other publications and other sources in addition to the *New York Times* and *Pravda*. For example, the Agency receives various reports from all other agencies which may relate to national defense or security — studies of weather or tide patterns from the National Oceanographic and Atmospheric Administration, estimates of petroleum production or demand from the Department of Energy, economic estimates from the Commerce Department or the Congress' Joint Economic Committee. The CIA also makes frequent use of public libraries, which it argued in the court of appeals were also intelligence sources. Reply Br. in *Sims I*, at 6. Indeed, the CIA's briefs in this Court acknowledge that roughly 80 percent of its raw data is derived from "the great open sources of information." Br. at 38. Presumably, all of these "open sources" are literally intelligence sources under the CIA's construction of the statute, and thus withholdable from public disclosure without any independent national security justification, subject only to the Director's standardless discretion to decide when disclosure would be "innocuous" and therefore permissible.

The second way in which CIA's proposed treatment of "innocuous" sources undercuts its argument is that its analysis is predicated on the recognition that Congress did not intend the CIA to withhold the name of every person who provided any kind of information which was useful to the Agency's mission. But unlike the court of appeals' formulation, the CIA's proposal would deprive the courts of any ability to review the Agency's withholding decisions by determining *de novo* whether disclosure would implicate the kind of problems which led Congress to enact the withholding statute. This approach to FOIA exemption is totally inconsistent with the letter and spirit of the FOIA generally, and of the post-*Robertson* amendment to Exemption 3 in particular.

Nor would this discretion be limited to the names of the sources. The ability to protect intelligence sources from unauthorized disclosure includes not only names but other identifying details such as information obtained from the source, or information about the activities in which the source was engaged, on the theory that such disclosure could "lead to" the identification of the source. *Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982). And, although the CIA must support such "lead to" claims with an affidavit, the nature of the question is such that in normal circumstances the claims are virtually immune from effective judicial review.

Thus, every "intelligence source" within the meaning of § 403(d)(3) is surrounded by a large penumbra of "lead to" information which may be withheld from disclosure even without any showing that disclosure of the information would be inimical to the national security. For example, data obtained from other agencies and the contents of public libraries could be withheld on the theory that their disclosure could lead to the identification of the agencies or the libraries from which they were obtained. Accordingly, limitless expansion of the term "intelligence source" with an exception for unreviewable CIA power to waive protection of the statute is tantamount to allowing the CIA unreviewable discretion to decide which of its activities will be disclosed and which may not.

Of course, the CIA has other secrecy needs beyond protecting intelligence sources. Indeed, as discussed more fully in the next section of this brief, other statutory protections are available to meet those legitimate needs. However, the narrow issue before the Court is not whether the CIA should be able to withhold the identities of the MKULTRA researchers, but whether they may be withheld on the only theory which the CIA has chosen to present in its certiorari petition — that they are "intelligence sources." And on that question, the record in the case establishes that, with a few exceptions, they are not.

The researchers who performed their work in laboratories or libraries plainly did not require confidentiality to persuade their own "sources" to cooperate in their research, or for any other reason that appears in the record. Indeed, many of the researchers were actually anxious to disclose their CIA research, but had to be urged or even threatened to prevent them from doing so. *E.g.*, App. 57, 60; Pet. App. 26a. A large number of others were unaware of any CIA relation to their work, and hence secrecy cannot have been a prerequisite for their cooperation. The evidence persuaded the district court — and the CIA's brief does not dispute this finding — that, with a very few exceptions, the researchers did not either seek or receive guarantees of confidentiality before participating in MKULTRA. Indeed, as the district court observed, the CIA's evidence showing that a few researchers did desire confidentiality only serves to highlight by "stark contrast" the absence of any reason to believe that the others sought it. Pet. App. 26a. Accordingly, the vast majority of the researchers were not "intelligence sources" within the meaning of § 403(d)(3) and are not protected from disclosure by it.

### D. *The Court of Appeals' Formulation Recognizes the Agency's Legitimate Secrecy Needs and Does Not Prevent the CIA From Performing Its Intelligence Mission.*

The CIA seeks to buttress its construction of § 403(d)(3) by arguing that the court of appeals' formula "could be extremely damaging to the CIA's ability to carry out its mission." Br. at 29. It posits difficulties which take two forms. First, the formula is said to require disclosure of information which could itself be damaging to the CIA. Br. at 34-40. Second, the mere existence of the standard would compromise the CIA's ability to provide an absolute assurance of confidentiality to potential sources of information, because such sources would be aware that the assurance would be subject to judicial review. Br. at 30-34. Neither argument withstands analysis.

### *1. The CIA's Parade of Horribles Would Not Follow From the Decisions Below.*

The CIA argues that the court of appeals' formulation would require many disclosures which would be damaging to the CIA's legitimate activities. It is contended both that the rule will lead to identification of many persons who require confidentiality and that the rule will require disclosures which would interfere, not with the CIA's ability to tap sources of information themselves, but with its legitimate efforts to conceal the nature of ongoing activities from foreign governments. The errors common to each of these apprehensions are that they either misconstrue the court of appeals' definition or ignore the availability of other statutes that protect its activities from public scrutiny.

a. The fallacy of the CIA's argument that only the traditional secret agent is comprehended by the court of appeals' formulation has already been discussed *supra* at 19-20. Travelers, journalists, and other persons who provide the CIA with information based on their contacts abroad were clearly contemplated by Congress as "intelligence sources" and qualify under the court of appeals' definition. It is obvious that the Agency would be unable to obtain the information that these sources provide without a guarantee of confidentiality. Indeed, the court of appeals in other cases has had no difficulty in finding that such contacts are intelligence sources who are protected from disclosure. *Miller v. Casey*, 730 F.2d 773 (D.C. Cir. 1984); *Afshar v. Department of State*, 702 F.2d 1125 (D.C. Cir. 1983); *Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982).[7]

b. The CIA suggests that the court of appeals would require identification of persons to whom confidentiality had to be guaranteed so long as the information was "theoretically in the public domain," even though it was not available "as a practical matter." Br. at 35-36. This argument assumes, however, that when the courts below construed the statute with an eye towards "the practical need for secrecy," Pet. App. 50a, they actually intended to disregard the practical requirements of intelligence operations. To the contrary, the courts below were extremely sensitive to the legitimate secrecy needs of the CIA, and there is nothing to support the CIA's contrary reading. The fact that the information was available from sources other than the one used by the CIA obviously bears on the need to guarantee confidentiality in order to obtain it. But if there are practical reasons why the CIA needed the information from a particular source — such as that the source was particularly reliable or convenient, as in the example posed in the CIA's brief at page 36 — the need to guarantee confidentiality to the potential source would be sufficient to warrant non-disclosure.

c. A related CIA objection is that the courts might second-guess the Agency's promise of confidentiality to a particular person, either because the promise was implicit rather than explicit, or was not in writing, and therefore not easily proved after the fact, or because the recipient of a promise was atypically leery of being publicly associated with the CIA. By requiring proof of matters which, by the nature of intelligence operations, are normally not memorialized, the decisions below would assertedly cripple the CIA's operations.

These CIA arguments, although appealing in the abstract, are flawed by their divorce from the realities of this case. Evidence about guarantees of confidentiality was sought here only because of the unique character of the information obtained by the MKULTRA researchers. The results of scientific research conducted at American universities on such subjects as the use of hypnosis as a memory enhancer and polygraph deceiver, or the optical rotatory power of solid and liquid crystals, was not the kind that would, by itself, imply that confidentiality was necessary.

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[7] The CIA represents, Br. at 17, that the Sims decisions were "apparently" not called to the court's attention in Afshar and Gardels. In fact, the meaning of Sims I was debated in each case both by the requesters and by the CIA itself.

The court of appeals was at pains to emphasize that evidence would not be needed in most cases. Pet. App. 83a-84a. Here, for example, one researcher's name was allowed to be withheld simply by virtue of the nature of his subproject — a trip to a conference in the USSR. Analysis of MKULTRA Files, *supra* n.4, at 10. Moreover, the courts below did not apply the Statute of Frauds to limit proof of CIA confidentiality guarantees. The district court accepted as adequate any evidence, either of a written guarantee, an express oral guarantee, or a guarantee which was implicit in other evidence which was presented. Pet. App. 26. *E.g.*, App. 62 (expression of desire for confidentiality on a different research project several years after MKULTRA). Indeed, the district court even heard unsworn *ex parte* testimony by CIA officials with no personal knowledge about MKULTRA.[9]

Nor is it accurate to say that the researchers' desire for confidentiality was unprovable because the researchers refused to have their names on documents in the CIA's files. Br. at 31 n.10. Although such reluctance is undoubtedly true of clandestine operators, or travelers and journalists, the record in this case suggests quite the opposite conclusion. Among the documents that survived destruction in 1973 are research proposals and contracts bearing the researchers' names, as well as written promises *by* researchers *to* the CIA that the CIA connection would not be revealed by the researchers. *E.g.*, App. 52. In these circumstances, if the CIA did not provide reciprocal promises, it was not because the researchers sought to avoid documentation, but, as the district court ruled, because the researchers did not care about confidentiality. Pet. App. 24a, 26a.

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[9] The affidavits offered by the CIA were extremely general, and carefully skirted the key questions of whether confidentiality either was or had to be promised by the CIA to the researchers. Moreover, as the district court noted, Pet. App. 27a, the affidavits were signed by CIA officers who were not involved in MKULTRA, despite the fact that the CIA had managed to produce officers who were involved to testify about the substance and procedures of MKULTRA at the congressional hearings.

Finally, the CIA objects to judicial second-guessing of confidentiality guarantees to persons who were "unreasonably or atypically leery" of open contact with the CIA. The Agency ignores the fact that the court of appeals expressly provided in this and other cases for judicial deference to sworn CIA statements by competent officials about the practical need for confidentiality or about the effects of a particular disclosure on its operations. Pet. App. 51a-53a; *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980). But if the CIA does promise confidentiality to an irrationally wary source, whose information could readily be obtained with equal reliability elsewhere, then a reviewing court should not be precluded from ruling that § 403(d)(3) does not protect that identity from disclosure.

In any event, the outcome in this case cannot properly turn on how the courts will deal with that problem if, indeed, they are ever confronted by such a source. Whatever the merits of its arguments about the need for confidentiality in other circumstances, the CIA has not shown that confidentiality was required for MKULTRA.

*d.* The CIA also contends that the courts below would require the identification of persons who unwittingly report information to CIA sources about foreign governments or other targets of CIA monitoring. Disclosure would lead, the CIA warns, to retaliation against the intermediary and loss of a valuable source of intelligence. Br. at 39-40 and n.15. There is no dispute about the applicable legal principles; respondents concede that the CIA may refuse to disclose information if it would lead to the identification of an intelligence source — here, the intermediary.

But here there is no such problem. The unwitting researchers in this case were funded by the CIA through a front group, the Society for the Investigation of Human Ecology, not because the researchers were unwilling to help the CIA, but because the CIA wanted to avoid publicity concerning the nature of its interests. *E.g.*, App. 55, 58, 60. Inasmuch as the Society's role in MKULTRA has been identified and the

Society dissolved, the researchers' names cannot be withheld either to protect it from disclosure, or to protect against disclosure of the MKULTRA program itself.

Finally, most of the MKULTRA information was such that, by its very nature, it could be obtained without guaranteeing confidentiality to anyone. For example, studies of reactions to alcohol after social drinking, computer analysis of bioelectric response patterns, and investigations of the transfer and storage of energy in organic systems are plainly of a different order than information about agricultural problems or work stoppages that a CIA agent may obtain from travelers to Kiev or Krakow. The agent, the travelers and the Ukrainians and Poles to whom they talked would be sources of intelligence; in this case, by contrast, neither the Society nor the researchers to whom it turned for scientific services are protected from disclosure. Again, the CIA's counterexamples do not provide a reason to reject the court of appeals' decision in this case.

e. The CIA professes concern that an FOIA requester could force the Agency to identify sources via a more circuitous route. It hypothesizes the case of a person who supplies both information of a sort which makes him or her an intelligence source and other information which is readily available from the public. The CIA argues that it might be required to disclose the nonintelligence relationship, despite the fact that the source would plainly be compromised in its other capacity as well. Br. at 36-37.

It is difficult to understand why the CIA complains about this possibility, inasmuch as respondents never contested the basic legal theory which the CIA asserts. Indeed, the Agency completely prevailed in the district court on this argument in this very case, and thus was permitted to withhold the identities of half of the MKULTRA researchers. In any event, the error of this argument is that it is always open to the Agency to prove that identification of a person with whom it had a non-intelligence contact would "lead to" disclosure of intelligence contacts.

f. The CIA argues that the court of appeals' formula would also require it to reveal the name of an "obscure Eastern European technical journal" to which it subscribes, on the theory that the journal is publicly available. Br. at 36. Although it seems doubtful both that there is any Eastern European publication to which the CIA does not subscribe, and that our adversaries do not assume as much, the example still does not advance the CIA's point. If non-disclosure were not "innocuous," *see supra* at 22, the Agency would surely be able to establish that disclosure of *its* subscription would cause sensitive information to be deleted from or misinformation to be added to the journal, and in that sense confidentiality would be necessary to obtain the information. Moreover, revelation of the indirect subscription might disclose intelligence methods, which are also protected by § 403(d)(3), by revealing the manner by which the journals were obtained undercover. In this case, by contrast, the manner in which the MKULTRA research was initiated, funded, and received by the CIA has been revealed, and the Agency has expressly renounced any reliance on the exemption for intelligence methods. CIA Answers to Plaintiffs' Interrogatories, February 26, 1979, at p. 57.

g. Finally, the CIA argues that it often keeps its contacts secret, not so much because the persons from whom it obtains information insist upon confidentiality, but because the Agency itself wishes to conceal from our adversaries the topics of its interest or the targets of its monitoring. The CIA postulates that revelation of these matters could damage the national security in a variety of ways — by making the targets more elusive; by disclosing the methods by which the CIA operates; and by encouraging others to take countermeasures. The Agency contends that, by confining the intelligence source exemption to only one of the many reasons for CIA secrecy, the court of appeals' formulation severely hampers the intelligence-gathering mission.

There are, however, two flaws in the CIA's analysis, one related to this case, and one of a more general nature. First, the argument that the CIA often needs to be able to conceal the topics in which it is interested simply has no bearing here. The fact that the CIA was interested in behavioral modification techniques and mind-altering drugs, and conducted a series of research projects on these topics in the 1950's and early 1960's, has already received "broad publicity." CIA Br. at 4. The CIA has disclaimed any interest in concealing from public scrutiny the details of the program, CIA Reply Brief in *Sims I*, at pp. 11-12; they are secret only because of the Agency's own document destruction activities.

But second, and more important, the fundamental error was not committed by the court of appeals, but by the CIA in trying to make the intelligence source exemption bear the full burden of protecting all of the CIA's secrecy interests. Indeed, the legislative debates which the CIA quotes extensively in its brief cut against its argument that § 403(d)(3) protects the CIA's own interest in avoiding enemy knowledge of its interests. For Congress was evidently concerned about the "deadly peril" faced by intelligence sources and about the fact that such sources would "close up like a clam" without protection. CIA Br. at 20. Thus was enacted § 403(d)(3), which does not authorize the Director to "protect the CIA from disclosure of the topics of its interest," but to "protect intelligence sources . . . from unauthorized disclosure."

Section 403(d)(3)'s protection for intelligence sources, of course, is but one of the many defenses available to the CIA in keeping its secrets secret. Even when that defense is not available, it may invoke the intelligence methods portion of § 403(d)(3); it may invoke 50 U.S.C. § 403g to protect the names and other data concerning personnel it employs; and, of course, it may invoke the national security exemption of the FOIA, 5 U.S.C. § 552(b)(l), if the records are properly classified.

In this case, however, the Agency has elected not to rely on these other alternatives despite the contrary urgings by the district court. It may have made this choice because these exemptions do not apply in this case, or as Judge Oberdorfer said to the CIA without contradiction during an *ex parte* hearing, it may have been done in order to make a test case which could expand the limits of the "intelligence sources" statute. App. 9. *See also* Pet. App. 60a (per Markey J.). Whatever the reason, the CIA cannot complain that its other secrecy interests, none of which is presently applicable to MKULTRA files, must be considered when it has failed to invoke the statutory defenses which protect them.

### 2. *The CIA Demand for Protection From the Perception of Its Inability to Prevent All Disclosures Is Tantamount to a Plea for Exemption From Judicial Review Under the FOIA.*

The CIA examples discussed in the previous section were predicated on inaccurate characterizations of the decisions below or incomplete views of the totality of defenses available to the CIA in an FOIA suit. The Agency's final argument, by contrast, is that by holding out even a possibility that in some cases the CIA will have to disclose some information which leads to the identification of a person with which it has had contact, the court of appeals' formulation will inhibit the future gathering of intelligence. By this argument, the CIA is seeking the sort of exemption from scrutiny under the FOIA which Congress has previously denied even with respect to Exemption 1 claims that release of the information sought could endanger the national security.

What matters here is not whether there is an actual disclosure of an intelligence source in any given FOIA case; rather, the CIA is concerned about the "appearance of confidentiality." Br. at 31, quoting *Snepp v. United States,* 444 U.S. 507, 509 n.3 (1980). Even if it is unlikely that a person's identity will be disclosed, the CIA argues that a perception that disclosure is even possible may discourage the assistance of persons who will refuse to provide needed information without an ironclad guarantee of confidentiality, even though they would themselves be intelligence sources under the court of appeals' formulation. Thus, the CIA seeks protection against its perceived inability to keep its sources secret.

The basic flaw in this argument is that it proves too much.

Even if the CIA wins this case, *some* potential sources may be deterred from providing the CIA with information simply because the CIA is subject to the FOIA, which in turn requires *de novo* judicial review of the Agency's decisions to withhold records. It is at least theoretically possible that the federal courts could mistakenly require the CIA to reveal some information which would identify an individual or organization that would prefer to avoid identification. Although a CIA victory expanding the definition of intelligence source here might reduce that possibility, the possibility remains, and that may in turn discourage intelligence sources, although perhaps fewer of them. Indeed, the Agency has repeatedly advised the Congress of its concerns in this regard, *see, e.g.*, S. Rep. 98-305, 98th Cong., 1st Sess. 5-8 (1978), but Congress has declined to give the Agency a total exemption from the FOIA such as the one which the National Security Agency has received, 50 U.S.C. § 402 note, Pub. L. 86-36, § 6, that would be needed to cure the perception problem if Congress found that there really was a problem of the sort claimed by the CIA.

Even where a request is for information whose disclosure would assertedly imperil the national security, Congress has provided for *de novo* judicial review of agency classification decisions. Although this Court originally construed the FOIA to require courts to defer automatically to executive decisions to withhold records in the interests of the national defense or foreign policy, *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), Congress amended Exemption 1 to require judicial scrutiny of the national security claims.[9] The CIA's claims under § 403(d)(3) are nothing less than an attempt to revive the rule of *Mink*, without even a national security justification, and in the face of an amended Exemption 3 that was intended to ensure that Congress through the courts, and

not the agencies, should be making the policy decisions about withholding.

Stated another way, the CIA's real problem rests in the fact that "intelligence source" is a finite category. Some persons are intelligence sources, and some persons are not intelligence sources. Because the FOIA requires courts to review exemption claims, it is the courts' task to decide who are intelligence sources, and the CIA's alleged perception problem will remain so long as there is a boundary and the courts, rather than the CIA, have the ultimate responsibility for mapping it.

But the only way to eliminate the problem, if one were shown to exist, would be to allow the Director to invoke the intelligence source exemption in his sole discretion, without any judicial review. That approach, however, is inconsistent with the basic FOIA principle of *de novo* review and in particular with Exemption 3, which includes only statutes which narrowly confine agency discretion to withhold.

* * *

If the CIA were primarily concerned with the dangers of disclosure here, it would have litigated this case very differently. It would have invoked the national security exemption. Or it would have acceded to the repeated urgings of the district court and contacted the researchers to gain information about their expectations of confidentiality. Or it would have presented affidavits from persons involved in MKULTRA, instead of officers with no direct knowledge about it. In short, it would have taken every precaution to prevent possible disclosure of the MKULTRA researchers.

For the CIA, however, this is a test case in which it is basically unconcerned with whether the MKULTRA researchers are identified. Rather, by presenting an extreme case, while denying the Court any recourse to other national security defenses, the Agency hopes to induce the Court to expand the statutory term of "intelligence source" and protect against a perception problem which it has been unable to persuade Congress to cure. As Chief Judge Markey said in urging that the names be disclosed, "It does the Agency no injustice to remark that one who appears to have thrown down a gauntlet should not be surprised when it appears to have been picked up." Pet. App. 60a. We urge the Court to reject the CIA's challenge and to affirm the portion of the judgment of the court of appeals that addresses the status of the researchers themselves.

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[9] That judicial review is deemed by Congress to be vital in the national security area is underscored by the fact that Congress passed the 1974 amendments over President Ford's veto, which singled out the revised Exemption 1 as the primary objection to the amendments. H. Doc. No. 93-383, 93rd Cong., 2d Sess. (1974).

## II. THE CIA FAILED TO PRESENT EVIDENCE TO ESTABLISH THAT DISCLOSURE OF THE REMAINING INSTITUTIONS AT WHICH THE MKULTRA RESEARCHERS WORKED WOULD LEAD TO THE IDENTIFICATION OF INTELLIGENCE SOURCES.

The district court recognized that there was no evidence in the record that the institutions at which the researchers were employed during MKULTRA had demanded or desired confidentiality in order to participate in the program. Pet. App. 27a. Indeed, in almost all instances, the CIA contacted the researchers directly, insisting that the institutions not be informed. *E.g.*, App. 60. Accordingly, the institutions themselves were never sources of intelligence.

However, picking up a suggestion advanced by CIA's counsel at oral argument following the remand from the court of appeals, the district court ruled that, because of "the possibility that [disclosing the institutions] might lead to the indirect disclosure of PRs," the CIA would be permitted to withhold the names of all institutions which employed the researchers who had been found to be intelligence sources. Pet. App. 27a. Although the court of appeals did not specifically address respondents' appeal from this portion of the district court's ruling, by affirming "all other aspects" of that decision, Pet. App. 11a, it apparently intended to affirm in this respect as well.

In objecting to this ruling, respondents do not dispute the general proposition that § 403(d)(3) allows the Agency not only to refuse to release the names of intelligence sources, but also to withhold other information which could lead to the identification of an intelligence source. *See Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982). However, under the FOIA the agency bears the burden of establishing that any claimed exemption is in fact applicable. 5 U.S.C. § 552(a)(4)(B). This requires the CIA to present evidence, not just arguments of counsel, to support its "lead to" claim. Not only did the Agency fail to present evidence, but the only record evidence bearing on the question pointed in the opposite direction.[10]

Thus, before the CIA's counsel decided to make its "lead to" argument, its affiant, M. Corley Wonus, made the following concession:

> With respect to institutions whose identities have not been released, the CIA admits that the *only* viable basis for continuing withholding their identities is a threat of damage to existing intelligence-related arrangements *with the institutions* or exposure of past relationships *with the institutions.* (emphasis added)
> App. 27.

Moreover, former CIA director Stansfield Turner also implicitly acknowledged this point when, in his affidavit, he described the reasons why some institutions' names had been released and others had not. Respondents had argued that the voluntary release of more than two-thirds of the names of the institutions indicated CIA recognition that the institutions were not themselves intelligence sources. Admiral Turner's response was that the Agency's obligations under § 403(d)(3) ended when an institution gave its consent to identification. Pet. App. 91a, 92a.

This statement is important for two reasons. It is evident that Admiral Turner did not believe that identification of the consenting institutions could lead to the identification of a researcher who worked there. Indeed, the subprojects for each institution were listed by the CIA adjacent to the institution, as shown in the addendum to this brief, thus specifying the MKULTRA research done at each institution. Moreover, the list of disclosed institutions includes not only such academic giants as Columbia, Harvard and Stanford Universities, but also smaller educational bodies such as the Center for International Studies and Montana State College, and various small companies and public agencies. There is no evidence and no explanation showing how the size and nature of the undisclosed institutions differ from the identified ones, such that identification of the former is more likely to lead to indirect exposure of researchers who worked for them than did naming the latter.

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[10] In fact, the CIA's original "lead to" claim was that identifying the researchers would lead to the identification of the institutions, rather than the present theory that naming the institutions would lead to disclosure of the researchers. CIA Memorandum in Opposition to Motion for Summary Judgment, at 6 (April 2, 1979).

Indeed, although almost all of the institutions, unidentified as well as identified, were unaware of the CIA's sponsorship of MKULTRA work, the CIA told each of them that researchers had been engaged in MKULTRA subprojects there. If disclosure of the institutions would lead to the *respondents'* identification of the researchers, presumably the letters to the institutions would have had at least the same effect. Given the Agency's evident lack of concern about any "lead to" effect of its letters to the institutions, it is apparent that its counsel's "lead to" claim in this case is an unsupportable afterthought.

In the face of these contrary indications, and in light of its burden under the FOIA to justify withholding, it was incumbent upon the CIA to present evidence to support its "lead to" claim. As Judge Wilkey stated in *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980), affidavits on this point would have received "substantial weight," inasmuch as they would advise the court about factual matters within the area of the Agency's national security expertise. Instead of presenting such evidence, however, the CIA rested solely on arguments by its lawyers. Because it submitted no evidence in support of its belated and illogical "lead to" claim, the Agency failed to carry its burden of proof and should have been required to identify all of the institutions.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed insofar as it relates to the MKULTRA researchers. Insofar as it pertains to the institutions, the judgment of the court of appeals should be reversed, and the case remanded with instructions to enter partial summary judgment in favor of the respondents.

Respectfully submitted,

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August 22, 1984

# ADDENDUM

## MKULTRA — Institutional Notifications

| | |
|---|---|
| *American Psychological Association*<br>[deleted]<br>American Psychological Association<br>1200 17th Street, N.W.<br>Washington, D.C. 20036 | Subprojects 107, 125 |
| *Bacteriological and Pharmaceutical Consultants, Inc.*<br>[deleted] | Subprojects 78, 110 (also MKSEARCH) |
| [deleted] | Subproject 22 |
| [deleted] | Subproject 142 |
| *Bio-Research, Inc.*<br>not sent | Subprojects 91, 94 |
| [deleted] | Subprojects 8, 10, 63, 66, 75, 114 (also BLUE/ART) |
| [deleted] | Subprojects 53, 120 |
| *Brastendahl Foundation*<br>See H.J. Rand Foundation | |
| *Butler Hospital and Health Center*<br>Butler Hospital and Health Center<br>333 Grotto Ave.<br>Providence, Rhode Island 02906 | Subprojects 66, 114 |
| *Children's International Summer Villages, Inc.*<br>[deleted]<br>RFD #1<br>Ellsworth, Maine 04605 | Subproject 103 |
| [deleted] | Subprojects 7, 27, 40 |

*Columbia University* — Subprojects 123, 130
[deleted]
Columbia University
Morningside Heights
New York, New York 10027

*Cornell University and the Medical School at Cornell* — Subprojects 48, 61, 65, 81, 1 (also BLUE/ART)
[deleted]
Cornell University and Medical School
at Cornell
Ithaca, New York 14857

[deleted] — Subprojects 51, 52

*University of Denver* — Subprojects 5, 29, 49
[deleted]
University of Denver
2301 South Gayford Street
Denver, Colorado 80210

[deleted] — Subproject 129

*The Educational Testing Service* — Subproject 77
[deleted]
The Educational Testing Service
Rosedale Rd.
Princeton, New Jersey 08540

*Emory University* — Subprojects 28, 47
[deleted]
Emory University
Atlanta, Georgia 30322

[deleted] — Subprojects 116, 146 (also MKSEARCH)

*University of Florida* — Subproject 126
[deleted]
University of Florida
Gainsville, Florida 32601

[deleted] — Subprojects 23, 35, 37, 45, 55

*George Washington University* — Subprojects 57, 129
[deleted]
George Washington University
Washington, D.C. 20052

[deleted] — Subproject 129

*Harvard University* — Subproject 84, 92
[deleted]
Harvard University
Cambridge, Massachusetts 02138

[deleted] — Subproject 102

[deleted] — Subproject 104, 143
University of Houston
Houston, Texas 77004

*University of Illinois* — Subproject 9, 26, 44 (also BLUE/ART)
[deleted]
University of Illinois
Urbana, Illinois 61801

[deleted] — Subproject 9

*University of Indiana* — Subproject 67, 112
[deleted]
University of Indiana
Bloomington, Indiana 47401

*Ionia State Hospital for Criminally Insane*
see Psychopathic Clinic of the
Recorders Courts, City of Detroit

| | |
|---|---|
| The Johns Hopkins University<br>Charles and 34th Streets<br>Baltimore, Maryland 21218 | Subproject 87 |
| [deleted] | Subprojects 23, 73, 147 |
| *Eli Lilly Company*<br>[deleted]<br>Eli Lilly Company<br>307 E. McCarty St.<br>Indianapolis, Indiana 46206 | Subprojects 6, 18<br>(also BLUE/ART) |
| [deleted] | Subprojects 9, 28 |
| *University of Maryland*<br>[deleted]<br>University of Maryland<br>College Park, MD 20742 | Subproject 59 |
| *Massachusetts Institute of Technology*<br>[deleted]<br>Massachusetts Institute of Technology<br>Center for International Studies<br>Cambridge, Mass. 02139 | Subproject 90 |
| [deleted] | Subproject 38 |
| *University of Minnesota*<br>[deleted]<br>University of Minnesota<br>Minneapolis, Minn.55455 | Subprojects 5, 25<br>(also BLUE/ART) |
| *Montana State College*<br>[deleted]<br>Montana State College<br>Bozeman, Montana 59715 | Subproject 22 |

| | |
|---|---|
| *J.P. Morgan and Co., Inc.*<br>[deleted]<br>J.P. Morgan and Co., Inc.<br>23 Wall Street<br>New York, N.Y. 10015 | Subproject 58 |
| [deleted] | Subprojects 7, 27, 40<br>(BLUE/ART) |
| *New Jersey Reformatory at Bordentown*<br>New Jersey Reformatory at Bordentown<br>Box 500<br>Bordentown, New Jersey | Subproject 47 |
| *New Jersey Neuropsychiatric Institute*<br>New Jersey Neuropsychiatric Institute<br>Box 100<br>Skillman, N.J. 08558 | Subproject 47<br>(also MKSEARCH) |
| [deleted] | Subprojects 134, 137 |
| *Ohio State University*<br>[deleted]<br>Ohio State University<br>660 Parrington Oval<br>Columbus, Ohio 43210 | Subproject 96, 101 |
| *University of Oklahoma*<br>[deleted]<br>University of Oklahoma<br>Norman, Oklahoma 73019 | Subprojects 43, 102 |
| *Panoramic Research, Inc.*<br>not sent | Subproject 94 |
| [deleted] | Subprojects 12, 32 |

*Pedlow Nease Chemical Company.* Subprojects 20, 31, 41
[deleted]
Nease Chemical Company, Inc.
Manufacturers of Organic Chemicals
Lock Haven, Pennsylvania

*University of Pennsylvania* [deleted]
[deleted]
University of Pennsylvania
Philadelphia, Pa. 19174

*Pennsylvania State University* Subprojects 99, 100, 118, 139
[deleted]
201 Old
University Park, Pennsylvania 16802

*Princeton University* Subprojects 1, 88
[deleted]
Princeton University
Princeton, N.J. 08540

*Psychopathic Clinic of the Recorders Court* Subproject 39
[deleted]
Ionia State Hospital
Ionia, Michigan 48846

*Queens College* Subproject 98
[deleted]
City University of New York
65-30 Kissena Blvd.
Flushing, New York 11367

*Rutgers University* Subproject 69
[deleted]
Rutgers University
New Brunswick, N.J. 08903

*H.J. Rand Foundation* Subproject 79
[deleted]
Brastendahl Foundation
12720 Lake Shore Drive
Cleveland, Ohio 44110

[deleted] Subproject 133

*Resources Research, Inc.* Subproject 106
Not sent

*University of Richmond* Subproject 23
[deleted]
University of Richmond
Richmond, Va. 23173

[deleted] Subprojects 17, 46, 148
(also BLUE/ART)

[deleted] Subproject 146

[deleted] Subprojects 124, 140
(also MKSEARCH)

[deleted] Subproject 21

[deleted] Subproject 11

*Stanford University School of Medicine* Subprojects 70, 71, 86, 85, 2
[deleted]
Stanford University School of Medicine
Stanford, California 94305

[deleted] Subproject 109

*University of Texas* Subproject 138
[deleted]
University of Texas
601 Colorado Street
Austin, Texas 78701

*Texas Christian University* Subproject 119
[deleted]
Texas Christian University
Fort Worth, Texas 76129

*University of Wisconsin* Subprojects 97, 105
[deleted]
University of Wisconsin
Madison, Wisconsin 53706

## MKULTRA Additional Institutions Notified

1. *Atlanta Federal Penitentiary* (Subproject 47)
[deleted]
Bureau of Prisons
320 First Street, N.W.
Washington, D.C. 20534

2. *Bureau of Narcotics* (Subprojects 3, 14, 16, 42
132, 149)
[deleted]
Drug Enforcement Administration
1405 I Street, N.W.
Washington, D.C. 20537

3. *Computer Analysis* (Subproject 125)
Unable to locate — not sent

4. [deleted] (Subproject 58 — Cosponsor)

5. *Leler University of Georgia* (Subproject 129)
Unable to locate — not sent

6. *Lexington Kentucky Narcotics Farm* (Subproject 73)
National Institute on Drug Aubse
11400 Rockville Pike
Rockwell Building
Rockville, Maryland 20852

7. *McGill University* (Subproject 68, 121)
[deleted]
P.O. Box 6070
Montreal, Quebec H 3C 361

8. *National Institute of Heath* (Subproject 125)
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also 18, 40, 146)

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# SUPPLEMENTAL
# BRIEF

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Nos. 83-1075 and 83-1249

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IN THE
# Supreme Court of the United States
October Term, 1984

CENTRAL INTELLIGENCE AGENCY
and WILLIAM J. CASEY,
Director of Central Intelligence,
*Petitioners-Respondents,*
v.

JOHN CARY SIMS and SIDNEY M. WOLFE,
*Respondents-Petitioners.*

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## RESPONDENTS' SUPPLEMENTAL BRIEF ON THE CENTRAL INTELLIGENCE AGENCY INFORMATION ACT

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October, 1984

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IN THE

# Supreme Court of the United States

October Term, 1984

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**ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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## RESPONDENTS' SUPPLEMENTAL BRIEF ON THE CENTRAL INTELLIGENCE AGENCY INFORMATION ACT

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After respondents filed their brief on the merits, Congress amended the National Security Act of 1947, upon which petitioners rely to support their claim that the identities of the principal researchers and institutions involved in the Central Intelligence Agency's MKULTRA Program are exempt from disclosure pursuant to Exemption 3 of the Freedom of Information Act. This brief, filed pursuant to this Court's Rule 35.5, discusses the effect of the amendment, enacted as the Central Intelligence Agency Information Act, Pub. L. 98-477, on October 15, 1984.

The new legislation does not by itself dispose of the legal issues raised by this case, not only because it is not retroactive, but also because it does not change the language of that portion of the National Security Act which is at issue here, 50 U.S.C. § 403(d)(3). However, the changes made in other parts of the statute, and the reasons given for those amendments, not only eliminate the public importance of this case on which the CIA relied in seeking certiorari, but also severely undermine the CIA's arguments by revising the context in which section 403(d)(3) must be construed.

As we more fully discuss below, the amendment affects this case in three respects. First, Congress has eliminated any basis for the "perception" argument upon which the CIA relies so heavily, Br. at 29-34, and which was advanced as the principal justification for the writ of certiorari. Petition at 8-12. Second, Congress has reaffirmed the critical importance of *de novo* judicial review in the implementation of the FOIA, even as applied to the CIA's most sensitive files. Finally, a review of the amendment's legislative history reaffirms that the "sources" Congress wishes to protect from disclosure are those whose willingness to participate depends on the CIA's protection of the confidentiality of their involvement — the very sources which are comprehended by the formulation of the court of appeals below. We discuss these effects of the Act in turn.[1]

1. The most important consequence of the new legislation is to deprive the CIA of the policy argument on which its case is premised. According to the CIA, the very fact of judicial review under the court of appeals' formulation would cause the CIA's intelligence sources to perceive that the CIA could not protect their identities from disclosure; this perception, in turn, was said to interfere with the recruitment and retention of such sources. In support of the legislation that became Public Law 98-477, the Agency made the very same policy arguments to Congress that it has advanced in this Court — that the process of reviewing its files in response to FOIA requests caused the same perception problem and that that problem would be eliminated by passage of the CIA Information Act. However, as we show below, Congress not only did not agree that the perception argument was a serious one, but indeed decided that whatever problem existed would be eliminated by the bill. This problem, therefore, cannot be advanced as the guiding principle for construing section 403(d)(3).

---

[1] The legislative history consists of three committee hearings, three committee reports, and three floor debates, which occurred in the following chronological order. The Senate Select Committee on Intelligence held hearings on June 21, June 28 and October 4, 1983, *S.1324, An Amendment to the National Security Act of 1947*, S. Hrg. 98-464 (1983) (here cited as "Senate Intelligence Hearings"), and issued a report on November 9, 1983. *Intelligence Information Act of 1983*, S. Rep. 98-305 (1983) (here cited as "Senate Intelligence Report"). The Senate passed its bill on November 17, 1983, following a debate reported at 129 Cong. Rec. S16742-S16746 (daily ed.). The Subcommittee on Legislation of the House Permanent Select Committee on Intelligence held a hearing on February 8, 1984, *Legislation to Modify the Application of the Freedom of Information Act to the Central Intelligence Agency* (here cited as "House Intelligence Hearing") and produced a report on May 1, 1984. *Central Intelligence Agency Information Act*, H. Rep. 98-726, Part 1 (1984) (here cited as "House Intelligence Report"). The Government Information, Justice and Agriculture Subcommittee of the House Committee on Government Operations held a hearing on May 10, 1984, *CIA Information Act* here cited as "House Gov't Ops. Hearing"), and issued a report on September 10, 1984. *Central Intelligence Agency Information Act*, H. Rep. 98-726, Part 2 (1984) (here cited as "House Gov't Ops. Report"). The House then passed H.R. 5164 on September 19, 1984, following a debate reported at 130 Cong. Rec. H9621-H9631 (daily ed.). The Senate acceded to the House bill on September 28, 1984, after a debate reported at 130 Cong. Rec. S12395-S12397 (daily ed.), and the President signed the Act on October 15, 1984. A copy of each of the Hearings and Reports has been lodged with the Clerk. All Congressional Record citations in this brief refer to the daily edition.

The origins of Public Law 98-477 lie in the Agency's efforts to obtain a complete exemption from the FOIA. Senate Intelligence Report at 7-8. However, Congress was unwilling to grant that request. To the contrary, it concluded that the FOIA plays a vital role in maintaining public confidence in our government, "particularly in agencies like the CIA." House Intelligence Report at 8-9. Thus, the CIA was forced to seek a narrower amendment – the exclusion of certain operational and related files from the process of search and review of records requested under the FOIA.

As enacted, Public Law 98-477 does not change the substantive standards for withholding any CIA records for which a search is required; instead, it exempts the CIA's "operational files" from the entire process. § 701(a). That term is given a precise definition to include only three separate categories of files found, respectively, in the Directorate of Operations, § 701(b)(1), the Directorate of Science and Technology, § 701(b)(2), and the Office of Security, § 701(b)(3). In addition, to assure that the exemption would not permit the Agency to conceal abuses of its authority, Congress provided that access to operational files would continue for requests by individuals for information about themselves, § 701(c)(1), for information relating to "special activities" (i.e., covert actions) whose existence is not exempt from disclosure, § 701(c)(2), and for matters which have been investigated by specific congressional or executive bodies for an impropriety or illegality. § 701(c)(3).[3]

The Agency presented several arguments in support of this proposal – (1) information in such files was rarely required to be disclosed after the process of search, review and application of FOIA exemptions for classified materials, as well as section 403(d)(3); (2) reviewing these highly sensitive records required experienced officers to be taken away from other tasks, and thus imposed a great administrative burden that could not be justified in light of the limited amount of information actually disclosed; (3) the administrative backlog created by the need for extreme care in the search and review process for operational files produced two to three year delays in responding to FOIA requests; and (4) sensitive files had to be exposed to FOIA reviewers who otherwise had no reason to see them. House Intelligence Report at 9-17; Senate Intelligence Report at 10-11. These arguments were received sympathetically by the Congress.

A fifth argument was presented by the CIA in support of the legislation, and in fact was touted as the most compelling reason for passage. In many respects tracking the arguments which it has advanced in this Court, the Agency argued that the FOIA process had damaged the CIA's ability to recruit intelligence sources and to elicit cooperation from foreign intelligence services. See House Intelligence Hearing at 11-12; Senate Intelligence Hearing at 6-8, 12-13. Quoting from the partial dissent of Judge Bork in this very case (*see* Pet. App. 13a), the CIA's representatives contended that the process of search and review created a perception on the part of many intelligence sources and intelligence services that the CIA could not provide them with an ironclad guarantee of confidentiality. Senate Intelligence Hearing at 13. According to the Agency's Deputy Director, despite the fact that intelligence sources are not in fact identified under the FOIA, "the key point is that those sources . . . have an entirely different perception." Senate Intelligence Hearings at 7. By eliminating search and review of operational files, he concluded, the legislation "will do away with the perception that a number of our sources have that they are threatened because of the present FOIA Act." *Id.* at 20. Moreover, the CIA, through its principal spokesman on the bill, Deputy Director John McMahon, guaranteed that the legislation resolving the problem was so satisfactory that the Agency would not seek further relief from the FOIA. *Id.* at 24-25; Senate Intelligence Report at 8; 130 Cong. Rec. H9631 (Sept. 17, 1984) (Rep. Mazzoli).[3]

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[3] The Act does not apply to actions filed before February 7, 1984. § 4. Even absent this non-retroactivity provision, the records sought here would not be protected from disclosure because MKULTRA has been investigated by Congress and others, and thus comes within the exception in section 701(c)(3). In addition, files reflecting programs such as MKULTRA "do not meet [the bill's] definition of operational files." 130 Cong. Rec. H9623 (Sept. 17, 1984). Indeed, the CIA explicitly agreed that the MKULTRA files would not be covered by the Act. *See* CIA analysis of categories of documents revealing CIA research programs at universities, Categories C24, C27 and C39, House Intelligence Hearing at 117-118, 124-125 (acknowledging that such documents are not "operational files" and are otherwise not exempted by the legislation). Thus, even if the search and review in this case had not already been conducted, the amendment would not enable the CIA to refuse to process respondents' request under the Act.

Although the CIA's other claims were largely accepted, Congressional reaction to the CIA's perception argument was decidedly tepid. The intelligence committees of both the House and the Senate found that any perception

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[3] Congress was fully aware both of the decisions of the court of appeals in this case and of the CIA's displeasure with them, yet did nothing to amend section 403(d)(3) to eliminate the CIA's objection. For example, at the House Intelligence Hearing conducted more than two months after the Agency's petition for certiorari had been filed in this Court, both this case and the CIA's views about it were specifically discussed. Hearing at 22, 26. Yet not only did Congress make no changes in section 403(d)(3) or otherwise attempt to overturn the decision below; it also elicited a commitment from the CIA not to seek any further FOIA relief. Senate Intelligence Report at 8; House Intelligence Report at 8 n. 5.

problems of intelligence sources did not outweigh the public benefits of the FOIA:

> In a free society, a national security agency's ability to serve the national interest depends as much on public confidence that its powers will not be misused as it does on the confidence of intelligence sources that their relationships with the CIA will be protected.
>
> House Intelligence Report at 8-9; Senate Intelligence Report at 13. *See also* 130 Cong. Rec. S 12397 (Sept. 28, 1984).

Although the Senate Intelligence Committee had proposed a legislative finding acknowledging the perception problem as one of several reasons warranting passage of the legislation, Senate Intelligence Report at 2, ¶ 8, *see also id.* at 12 (relying on McMahon statement quoted supra p. 6), the House committees disagreed and the finding was deleted from the statute.[4] As the House Intelligence Committee explained, "The Committee remains skeptical of the validity of the perception problem and does not consider it to be a major factor" supporting the legislation. House Intelligence Report at 10. The House Government Operations Committee was even firmer: it concluded not only that the perception argument was flawed, but also that "the unwarranted perceptions of foreign intelligence sources about the operations of the FOIA do not provide justification for changes in the law." House Gov't Ops. Report at 8. And all three committees agreed that "enactment of H.R. 5164 will change whatever perceptions need changing." House Intelligence Report at 10. *See also* Senate Intelligence Report at 8 (bill sends a "clear signal to our sources . . . that the information which puts them at risk will no longer be subject to the [FOIA] process"); House Gov't Ops. Report at 8 (to the extent that sources are afraid, correction of perceptions is a welcome byproduct of the bill).

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[4] The House committee reports must be regarded as more authoritative than that of the Senate committee. The Senate bill, S. 1324, was passed first, in 1983, and a substantially similar bill, H.R. 4431, was introduced by Representative Whitehurst, the ranking minority member of the House Intelligence Committee's Subcommittee on Legislation. House Intelligence Hearing at 1, 95-104. A substantially different version, H.R. 3460, was introduced by Representative Mazzoli, the subcommittee chairman. *Id.* at 1, 91-94. After the House Intelligence Hearing was completed, Representatives Mazzoli, Whitehurst and others introduced H.R. 5164, which embodied the Mazzoli bill and several amendments. House Gov't Ops. Hearing at 2-9. H.R. 5164 was endorsed by both House committees and passed by the House. The Senate then abandoned its own bill, which had been more favorable to the CIA, and passed the House bill without amendment. Because the House reports more closely track the bill that was ultimately enacted, they are more persuasive legislative history than the Senate report.

Having failed to persuade Congress that the "perception argument" poses a significant problem, and having obtained passage of amendments to the National Security Act by assuring Congress that the amendments would eliminate the need for further FOIA relief, the CIA's attempt to resuscitate the perception problem in its briefs to this Court should be rejected. Indeed, because the perception argument was the heart of the justification for certiorari, Pet. at 8-12, the writ should be dismissed because the case no longer presents an issue of substantial public importance.

2. In addition to eliminating the CIA's perception argument, the CIA Information Act undercuts another persistent theme of the Agency's arguments in this Court, to the effect that judicial review of Agency determinations of who is an intelligence source is inconsistent with the National Security Act. The CIA's initial position before the Senate Intelligence Committee was that there should be no judicial review of the Agency's determinations about which of its files are "operational." Senate Intelligence Hearing at 23 (any kind of judicial review would defeat what Congress hopes to accomplish by the legislation). *See also id.* at 51-52. The Senate Committee rejected this extreme position and adopted a judicial review provision that combined *de novo* and deferential standards of review. Senate Intelligence Report at 3-4, § 701(e). By the time of the House Intelligence Hearing, the CIA had accepted the principle of some judicial review, but opposed *de novo* review. Thus, testifying before the House Intelligence Committee, CIA attorney Edward Page Moffett, one of the Agency's counsel in this very case, noted that under current law, a court could substitute its judgment for the CIA in deciding whether an individual qualified for protection as a source. Hearing at 26. CIA and other government witnesses argued that such *de novo* review should not apply to decisions made under the amendment. *Id.* at 34-38. The issue of the appropriate standard for judicial review was the thorniest issue during the deliberations of the House committees. House Intelligence Report at 32-36; 130 Cong. Rec. H9627 (Sept. 17, 1984) (Rep. Kindness). After devoting extensive consideration to this issue, the House committees reported a bill which retained in section 701(f) the same *de novo* review as currently required by 5 U.S.C. § 552(a)(4)(B), albeit with modified procedures for creating the record upon which review would be conducted. The CIA found this compromise acceptable.

Thus, just as Congress was not persuaded of the CIA's claimed need for a total FOIA exemption and of the significance of the perception problem, Congress rejected the CIA's attack on *de novo* judicial review. To the contrary, Congress concluded, just as it had in 1966 when the FOIA was passed, and in 1974 when the Act was amended to overrule *EPA v. Mink*, 410 U.S. 73 (1973), "that *de novo* judicial review is essential to ensure effective CIA implementation of the [FOIA] and to maintain public confidence in the implementation of the Act." House Intelligence Report at 32-33; Senate Intelligence Report at 43-44. *See also* 130 Cong. Rec. H9623 (Sept. 17, 1984) (Rep. Boland) ("the cornerstone of FOIA review and . . . the bedrock of review under H.R. 5164"), H9628 (Sept. 17, 1984) (Rep. Whitehurst). Surely, if *de novo* judicial review is required even with respect to "these most sensitive operational files," 129 Cong. Rec. S16743 (Nov. 17, 1983) (Sen. Goldwater), it is equally necessary in deciding whether the participants in a declassified program of scientific research are "intelligence sources" within the meaning of section 403(d)(3).

3. The hearings and reports which produced the CIA Information Act undermine the Agency's arguments in still another respect, by making it clear that the "intelligence sources" whom Congress wishes to protect do not include the sort of scientific researchers whose identities are at issue in this case. To the contrary, the legislative history of the CIA Information Act, just like the legislative history of the National Security Act cited by the CIA in its brief, contains no hint that these researchers qualify as intelligence sources. Instead, it is replete with references to the problems of "agents in the Soviet Union [and] in other parts of the world," House Intelligence Hearing at 16, to "our allies and individuals abroad who risk their lives," House Intelligence Hearing at 3, to "those who risk their lives and livelihoods," 130 Cong. Rec. S12396 (Sept. 28, 1984) (Sen. Goldwater), to "foreign sources," House Gov't Ops. Report at 8, and to "CIA sources abroad." Cong. Rec. H9629 (Sept. 17, 1984) (Rep. Stump). *See also* House Intelligence Report at 20-21 ("sensitive human and technical intelligence activities"). Thus, whatever the precise scope of the term "intelligence sources" may be, it surely does not encompass the domestic scientific researchers who conducted the MKULTRA program, or the universities at which the research was performed.

## CONCLUSION

For these reasons, the writ should be dismissed because the intervening change in the National Security Act eliminates the problem which justified issuance of the writ. Alternately, the decision below should be affirmed insofar as it pertains to the identities of the principal researchers and reversed insofar as it pertains to the institutions.

Respectfully submitted,

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October, 1984

# REPLY BRIEF

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No. 83-1075

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*v.*

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*ON WRIT OF CERTIORARI TO THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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# In the Supreme Court of the United States

OCTOBER TERM, 1984

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*v.*

JOHN CARY SIMS AND SIDNEY M. WOLFE

*ON WRIT OF CERTIORARI TO THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

The argument of our opening brief is straightforward: Exemption 3 of the Freedom of Information Act incorporates by reference certain statutes that authorize agencies to withhold documents; 50 U.S.C. 403(d)(3), which makes the Director of Central Intelligence responsible for protecting "intelligence sources and methods" from unauthorized disclosure, is an Exemption 3 statute; and in determining whether a document can be withheld pursuant to this provision, the term "intelligence sources" should be given its plain meaning, since there is no evidence whatever that Congress intended otherwise. Respondents' somewhat confusing brief makes a variety of arguments, but respondents do not identify anything in Section 403(d)(3) or its legislative history suggesting that Congress believed the term "intelligence sources" should be given something other than its plain meaning.

Instead, respondents contend that the FOIA itself somehow mandates that the term "intelligence sources" not be given its plain meaning.[1] Respondents also attempt to sidestep the question presented in this case—the definition of "intelligence sources" for purposes of Section 403(d)(3) and Exemption 3—by asserting that they are entitled to prevail because Congress would in any event not have intended to protect the identity of MKULTRA researchers. Finally, respondents reiterate the plainly erroneous contention that Section 403(d)(3) need not be given its plain meaning because the CIA can manipulate other FOIA exemptions if it is truly determined to protect particular materials.

1. Respondents, unable to identify anything in the language or legislative history of Section 403(d)(3) that suggests that the term "intelligence sources" should not be given its plain meaning, invoke the FOIA itself in support of a "narrow" construction of Section 403(d)(3) (see Resp. Br. 2, 12, 14-18). Specifically, respondents contend that Congress's actions at the time it amended Exemption 3 in 1976 are relevant to the interpretation of Section 403(d)(3), which was enacted in 1947; and that if Section 403(d)(3) is not interpreted in the way respondents suggest, it will not qualify as an Exemption 3 statute at all.

a. In our opening brief, we explained (Pet. Br. 22-24) why it is an obvious error to read the pro-disclosure policies of the FOIA into the statutes incorporated by Exemption 3. Exemption 3 provides that the FOIA "does not apply to matters that are * * * specifically exempted from disclosure by statute * * * provided that such statute" meets certain criteria. 5 U.S.C. 552(b)(3). Accordingly, once it is determined that a statute meets the specified criteria, the only question is whether *that statute* exempts the materials in issue from disclosure. If Section 403(d)(3) is an Exemption 3 statute, the FOIA "does not apply" to any materials "exempted from disclosure by" Section 403(d)(3); once it is determined that Section 403(d)(3) is an Exemption 3 statute, the purposes and policies of the FOIA are irrelevant, and the only question is whether the Director is authorized to withhold the documents in question under Section 403(d)(3).

As we noted in our opening brief, that is the way this Court has always interpreted Exemption 3. See Pet. Br. 23 n.6, citing *Baldrige* v. *Shapiro*, 455 U.S. 345 (1982), and *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

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[1] At one point, respondents "agree that an intelligence source is one who provides the CIA with a certain kind of information, namely intelligence" (Resp. Br. 11). This suggests that respondents agree with us on the question presented in the petition—that is, they agree that the term "intelligence sources" should be given its plain meaning—and disagree only over the application of the term to the MKULTRA researchers, a point we discuss at pages 8-10, *infra*.

But respondents also defend, at length, the court of appeals' definition of "intelligence sources" (see Resp. Br. 21-35). That definition, of course, would not protect all those "who provide the CIA with a certain kind of information, namely intelligence"; it would protect such individuals only when the Agency can demonstrate, after the fact, that it had to guarantee confidentiality to the source in order to obtain the kind of information that was provided.

The legislative history of Exemption 3 also confirms this point; it states that Exemption 3 "*incorporat[es] by reference* exemptions contained in [the] * * * statutes" that satisfy its criteria. H.R. Conf. Rep. 94-1441, 94th Cong., 2d Sess. 14 (1976) (emphasis added); *see id.* at 25. We know of nothing in the language or legislative history of Exemption 3 or its amendment suggesting that the exemption modifies those statutes that it incorporates.[5]

Respondents nevertheless assert (Resp. Br. 18) that the 1976 amendment to Exemption 3 was "a later development" in "an evolving scheme" that began with Section 403(d)(3). But respondents identify nothing in the legislative history of the amendment to Exemption 3—or anywhere else—that reflects any intention by Congress to reconsider or modify the scope of the protection afforded by Section 403(d)(3), to narrow the Director's authority under that provision, or to give the term "intelligence sources" anything other than the meaning it had when Congress enacted Section 403(d)(3) in 1947.

b. As discussed in our opening brief (Pet. Br. 15), the legislative history of Exemption 3 specifically identifies Section 403(d)(3) as one of the statutes incorporated by reference, and every court of appeals decision dealing with the issue has held that Section 403(d)(3) is an Exemption 3 statute. Respondents are careful not to deny that Section 403(d)(3) is an Exemption 3 statute.[6] Instead, they assert that Sec-

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[5] Moreover, if Section 403(d)(3) were interpreted more narrowly when it is incorporated by reference in Exemption 3 than in other contexts, various anomalies would result. For example, the Director's efforts to exercise his authority directly under Section 403(d)(3) to protect information—such as by denying information that would reveal an intelligence source to a civil litigant who sought it in discovery—could be circumvented by the filing of an FOIA request. The Court has consistently refused to interpret the FOIA in a way that would lead to such peculiar results. See, *e.g.*, *United States* v. *Weber Aircraft Corp.*, No. 82-1616 (Mar. 20, 1984), slip op. 9.

[6] Respondents do take issue with our statement that the legislative history of Exemption 3 explicitly identifies 50 U.S.C. 403(d)(3) as an Exemption 3 statute. See Resp. Br. 16-17 & n.6. Respondents' reason for doing so is unclear, because they do not ever deny that Section 403(d)(3) is an Exemption 3 statute. In any event, our statement is correct.

An early version of the 1976 amendment to Exemption 3 would have exempted only "matters that are * * * required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information" (H.R. Rep. 94-880, 94th Cong., 2d Sess., Pt. 1, at 25 (1976) (emphasis omitted)). Congress recognized that because this language referred only to statutes that "require[]" withholding, it would presumably not incorporate provisions like Section 403(d)(3), which give an agency discretion to decide whether to disclose certain materials.

Accordingly, the House Judiciary Committee broadened the exemption to apply to matters that are "required or permitted to be withheld from the public by any statute establishing particular criteria or referring to particular types of information." H.R. Rep. 94-880, 94th Cong., 2d Sess., Pt. 2, at 25 (1976) (emphasis omitted). The Judiciary Committee explained that the purpose of this amendment was precisely to include within Exemption 3 certain statutes that afford agencies discretion in deciding whether to withhold materials (*id.* at 15; footnote omitted):

> [U]nder the original language of this bill, a statute that permits withholding rather than actually requiring it would not come within the exception * * *. While the committee agrees that the language concerning criteria or types of information should be retained, it was felt that limiting the exemption to information required to be withheld by statute would be too restrictive. Rather, the exemption should extend to those statutes which require or permit information to be withheld from the public

tion 403(d)(3) must be interpreted according to the definition devised by the court of appeals—rather than according to its plain language—or it would not be an Exemption 3 statute.

Respondents never explain why this assertion is correct, however. See, *e.g.*, Resp. Br. 12, 13, 17, 23. Exemption 3 incorporates statutes that "refer[] to particular types of matters to be withheld" (5 U.S.C. 552(b)(3)(B)). Section 403(d)(3)—interpreted, as we urge, according to its plain meaning—authorizes the withholding of information that would reveal "intelligence sources and methods." Respondents nowhere explain why this description is insufficiently "particular"; and as we show (pages 5-6 note 3, *supra*), the legislative history demonstrates that Congress considered Section 403(d)(3) to be a sufficiently "particular" statute. See also *Goland* v. *CIA*, 607 F.2d 339 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980).[4]

Respondents assert that Section 403(d)(3), if interpreted according to its plain meaning, "would be

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> where the statute establishes criteria or refers to particular types of information.

The committee specifically stated that Section 403(d)(3) was one of the statutes it had in mind (H.R. Rep. 94-880, *supra*, Pt. 2, at 15 n.2):

> This would clarify the fact that statutes such as 50 U.S.C. 403(d)(3) concerning security information * * * are included.

This legislative history establishes two points. First, Congress considered Section 403(d)(3) to be a "statute establishing particular criteria or referring to particular types of information." Second, Congress intended to make Section 403(d)(3) an Exemption 3 statute even though the Director has discretion in making disclosure decisions.

Respondents emphasize that the term "permit" was not included in the version of amended Exemption 3 that was ultimately enacted (see Resp. Br. 16-17 & n.6). But the deletion of this term did not reflect any intention by Congress to reconsider its decision to include discretionary statutes like Section 403(d)(3) within Exemption 3. It is entirely clear that Subsection 3(B) of Exemption 3, as enacted, applies to statutes that permit but do not require nondisclosure; indeed, Subsection 3(B) refers only to such statutes.

In fact, the term "permit" was deleted from the proposed amended version of Exemption 3 in the course of a rewriting of the exemption that was needed for a purpose that is immaterial to this case—to ensure that the exemption would apply to all statutes that mandate withholding. On the House floor, Rep. McCloskey successfully moved to replace the version of Exemption 3 drafted by the House Judiciary Committee with a version that closely resembles the provision that was subsequently enacted. Rep. McCloskey stated that his sole purpose in offering this amendment was to ensure that all statutes mandating nondisclosure, as well as those statutes permitting disclosure that establish specific criteria or specify particular types of information, would be incorporated by reference. 122 Cong. Rec. 24211-24212 (1976). See also 122 Cong. Rec. 28473 (1976) (remarks of Rep. Abzug). Nothing in the legislative history of this floor amendment remotely suggests that it was intended to exclude discretionary statutes in general, or Section 403(d)(3) in particular, from Exemption 3. See *DeLaurentiis* v. *Haig*, 686 F.2d 192, 195-197 (3d Cir. 1982).

[4] Indeed, respondents acknowledge (Resp. Br. 16) that Section 403(d)(3) was an Exemption 3 statute before the 1976 amendment to Exemption 3, and they do not suggest that at that time only a qualified protection was afforded to "intelligence sources." It is highly unlikely that when Congress enacted the 1976 amendment it would have eliminated or substantially narrowed this sensitive and vital protection without explicitly addressing the matter in the legislative history or the statute itself. Cf. *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 572-573 (1983). Instead, the legislative history unmistakably reveals Congress's intention to continue to protect "intelligence sources" (see pages 5-7 note 3, *supra*).

too expansive and too discretionary to pass muster under Exemption 3" (Resp. Br. 17) and would "become[] the sort of open-ended discretionary withholding statute which is now excluded from the ambit of Exemption 3(B)" (Resp. Br. 23). But neither the discretionary character nor the alleged "expansiveness" of Section 403(d)(3) prevents it from being an Exemption 3 statute. The fact that Section 403(d)(3) affords discretion only disqualifies it from being incorporated by Exemption 3(A), a provision on which we do not rely; the manifest purpose of Exemption 3(B) is to incorporate by reference certain statutes that do not require withholding but permit discretionary decisions about disclosure. See also pages 5-7 note 3, *supra*. Similarly, respondents' assertion that Section 403(d)(3) is "too expansive" is nothing more than an expression of respondents' disagreement with Congress's decision to grant the Director the authority to protect all intelligence sources from disclosure, without qualification.

2. Respondents also contend (Resp. Br. 18-21) that when Congress used the term "intelligence sources" in Section 403(d)(3), it did not intend to refer to persons like the MKULTRA researchers but instead "had a very different sort of 'intelligence source' in mind" (Resp. Br. 19). The best indication of what Congress "had in mind" is, of course, the plain language of the statute it enacted, and respondents do not explain why the MKULTRA researchers are not sources of intelligence within the ordinary meaning of that term.

Respondents instead argue that they are entitled to prevail because scientific researchers were not specifically adverted to as potential intelligence sources in the legislative debates on the National Security Act of 1947. See, *e.g.*, Resp. Br. 19-20. See also Resp.

Supp. Br. 2, 10.[5] But Congress, undoubtedly well aware that the gathering of intelligence is a complex matter and that intelligence techniques change over time, never purported to provide an exhaustive list of the kinds of intelligence sources it envisioned. Cf. *United States* v. *Weber Aircraft Corp.*, No. 82-1616 (Mar. 20, 1984), slip op. 9-10. Indeed, as we noted in our opening brief (Pet. Br. 17) and as respondents acknowledge (Resp. Br. 12), the congressional discussions reveal that Congress expected that a wide variety of diverse entities might potentially serve as intelligence sources. Accordingly, Congress chose not to limit the definition of "intelligence sources" in the legislative history but rather simply authorized the Director to protect "intelligence sources and methods," without qualification. The fact that Congress did not mention scientific researchers in the legislative history is unquestionably not a reason to exclude them from the category of intelligence sources.[6] See, *e.g.*, *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980).

Respondents' assertion that MKULTRA research was "far removed from the basic mission of the CIA" (Resp. Br. 2) simply ignores the fact that—as we noted in our opening brief (Pet. Br. 15-16)—the courts below had no difficulty in determining that MKULTRA research was an important aspect of the

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[5] "Resp. Supp. Br." refers to respondents' Supplemental Brief on the Central Intelligence Agency Information Act.

[6] In fact, contrary to respondents' assertion (Resp. Supp. Br. 10), the legislative history of the recently enacted Central Intelligence Agency Information Act, Pub. L. No. 98-477 (enacted Oct. 15, 1984), reveals Congress's understanding that scientific researchers would be intelligence sources. See H.R. Rep. 98-726, 98th Cong., 2d Sess., Pt. 1, at 22 (1984).

Agency's intelligence-gathering mission. The district court specifically ruled that the CIA "could reasonably determine that this research was needed for its intelligence function" (Pet. App. 11a-23a), and the court of appeals did not question that ruling. Even Judge Markey, who would have ordered the researchers' identities disclosed without further proceedings, acknowledged that "the Agency's need for research data 'to perform its intelligence function effectively' has not been challenged on this record" (*id.* at 62a).

As the courts below explained, MKULTRA research was related to the Agency's intelligence-gathering function in part because it revealed information about the ability of foreign governments to use drugs and other biological, chemical, or physical agents in warfare or intelligence operations against the United States. The district court ruled that "[e]ven some of the more innocuous subjects researched" under the auspices of MKULTRA were connected to the Agency's foreign intelligence mission because the Agency had a legitimate concern that potential foreign enemies could be engaged in similar research" and "desire[d] to take effective countermeasures" (Pet. App. 22a). Judge Markey similarly explained that the Agency "has established its claimed need for the information [provided by the researchers], that is, to counter use of such drugs by potential adversaries and to develop its own capacity for their use." *Id.* at 62a; see also *id.* at 89a-90a; J.A. 29, 35. Consequently, there is no basis for respondents' assertion that MKULTRA did not involve a legitimate foreign intelligence concern.[7]

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[7] Respondents' suggestion (*e.g.*, Resp. Br. 20, 30) that scientific researchers can never qualify as intelligence sources

3. Respondents are confident that the court of appeals will interpret its definition of "intelligence

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is manifestly wrong. The record contains several examples of the importance of scientists as American intelligence sources, including those scientists involved in "[t]he secret development and use of radar during World War II, as well as the secret development of nuclear weapons in the Manhattan Project" (J.A. 43). And as Director of Central Intelligence Turner explained in an affidavit filed in this litigation, "the individual who conceived the idea of a particular high altitude photographic platform utilizing previously untried technology and who offered his idea to the CIA was an intelligence source. Had his association with the CIA or the Agency's interest in his concept been revealed in an untimely fashion, the intelligence units which resulted from the development of the U-2 reconnaissance aircraft might never have been realized" (Pet. App. 88a).

Respondents also assert (Resp. Br. 20) that many of the MKULTRA researchers cannot be intelligence sources because they performed their functions at universities and other institutions within the United States. But while the CIA's mission is the collection and analysis of foreign intelligence, the legislative history of Section 403(d)(3) makes explicit what common sense dictates—that the Agency is not precluded from contacting persons located within the United States who possess information that the CIA can use in carrying out its foreign intelligence functions. See *National Security Act of 1947: Hearings on H.R. 2319 Before the House Comm. on Expenditures in the Executive Departments*, 80th Cong., 1st Sess. 29 (June 27, 1947) (published 1982); *Gardels v. CIA*, 689 F.2d 1100, 1104 (D.C. Cir. 1982).

Finally, respondents repeatedly attempt to trivialize the intelligence value of the MKULTRA research by noting that it involved such subjects as sleight-of-hand techniques and the placebo effect (see *e.g.*, Resp. Br. 9 n.4, 19, 20, 24-25, 27-28). As Director Turner's affidavit explained, MKULTRA was initiated because the CIA was confronted with "learning the state of the art of behavioral modification at a time when the U.S. government was concerned about inexplicable behavior of persons behind the 'iron curtain' and American prisoners sources" in highly creative ways that will avoid some of the damaging results that that definition seems to dictate (see Resp. Br. 26-31). But respondents make no mention of *Fitzgibbon* v. *CIA*, 578 F. Supp. 704 (D.D.C. 1983), appeal pending, No. 84-5611 (D.C. Cir.), a decision we discussed in both the petition (Pet. 11 n.2, 15) and our opening brief (Pet. Br. 33 n.12, 37 n.14), in which the district court applied the court of appeals' definition to require the disclosure of intelligence sources in the Dominican Republic on the basis of highly speculative judgments about that nation's political system. (We note that on October 29, 1984, the court of appeals issued an order suspending briefing and further proceedings in *Fitzgibbon* pending this Court's decision in the present case.) Respondents' self-serving predictions about the ways in which the court of appeals' definition will be construed are based on their assertion that courts will not take the definition at face value if doing so would lead to results that are inconsistent with "the practical requirements of intelligence operations" (Resp. Br. 27). Courts, however, are ill-equipped to assess the practicalities of intelligence operations; Congress has entrusted that task to the Director. Moreover, even respondents are forced to recognize that the court of appeals' definition would require the Agency to breach explicit promises of confidentiality (Resp. Br. 29); to reveal the subjects in which it is

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of war who had been subjected to so-called brainwashing" (Pet. App. 89a). Accordingly, the CIA supported "comprehensive" research aimed at discovering whether a variety of substances would influence human behavior (*ibid.*; J.A. 29, 33). No one could predict at the time which areas of research would prove most promising, but all of it was directed toward an important foreign intelligence mission.

interested (Resp. Br. 31-32); and to give its sources less assurance that it will be able to protect them (Resp. Br. 33-35).[8]

Respondents' answer to these concerns appears to be that the Agency can protect highly sensitive information by classifying it and invoking Exemption 1 of the FOIA, 5 U.S.C. 552(b)(1). See, *e.g.*, Resp. Br. 2, 6, 13, 24. It is ironic that respondents, who claim to champion the values underlying the FOIA, prescribe the classification of materials that would otherwise be left unclassified as the panacea for what they apparently agree are the unacceptable effects of the court of appeals' decision.[9] Respondents made a similar contention in opposing our petition for a writ of certiorari, and we discussed it in our reply brief supporting the petition (Reply Br. 2-4). As we explained there, material that can reveal the identity of an intelligence source will not always be classified. Moreover, respondents' contention again loses sight of the fact that Congress itself, in enacting Section 403(d)(3), determined that the national interest required the protection of intelligence sources and methods from unauthorized disclosure; there is no basis for imposing on the Director the further requirement that he show that the identities of the sources were properly classified, or that secrecy was needed to obtain the kind of information that a source supplied. This case involves discerning Congress's intentions in enacting a specific, comprehensive "statutory mandate" to the Director to protect intelligence sources (*Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980)). There is no reason whatever to believe that when Congress, in 1947, granted the Director of Central Intelligence the authority to protect "intelligence sources and methods," it also intended sub silentio to withhold or qualify that authority in important categories of cases because it envisioned that other means of maintaining secrecy might be available. See *FBI* v. *Abramson*, 456 U.S. 615, 629-630 (1982).[10]

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[8] Director Turner, in his affidavit, explained the importance of this concern to this case. See Pet. App. 91a-92a. Cf. *United States* v. *Weber Aircraft Corp.*, No. 82-1616 (Mar. 20, 1984), slip op. 10-11 n.23.

[9] Respondents impugn the CIA's motives by suggesting that the Agency did not classify the documents at issue in this case and invoke Exemption 1 because it wished to create a "test case" (Resp. Br. 23). We note in this regard that the decision to declassify the researchers' identities was made in the summer of 1977 (Pet. App. 90a), and the complaint in this case was not filed until November 20, 1978 (J.A. 1).

4. In their supplemental brief, respondents contend that the enactment on October 15, 1984 of the Central Intelligence Agency Information Act, Pub. L. No. 98-477, is a reason for this Court either to dismiss the writ of certiorari or to affirm the judgment below. We note that when respondents opposed our petition, they made a similar contention (Memo. in Opp. 12-13) about the proposed legislation that became the Central Intelligence Agency Information Act. We answered that contention in our reply brief supporting the petition (Reply Br. 7-8).

As respondents acknowledge (Resp. Supp. Br. 1-2), the new legislation does not affect the legal issue presented in this case, because it in no way modifies the definition of "intelligence sources" in 50 U.S.C. 403(d)(3). Moreover, as we have explained (Reply Br. 8), this legislation does not solve the practical problems created by the court of appeals' definition of "intelligence sources"; the new legislation partially excludes CIA operational files from the FOIA, but information pertaining to intelligence sources is found in nonoperational CIA files, and in the operational files that are not excluded as well.[11]

Respondents assert that in enacting the new legislation "Congress has eliminated any basis for the 'perception' argument upon which the CIA relies so heavily" (Resp. Supp. Br. 2), that "Congress * * * did not agree that the perception argument was a serious one" (*id.* at 3), and that "the perception * * * problem * * * cannot be advanced as the guiding principle for construing section 403(d)(3)" (*ibid.*). It is unclear what respondents mean by these vague statements. Congress of course recognized, repeatedly, that the CIA is legitimately concerned about the extent to which potential sources perceive the Agency as being unable to protect their confidences. This is hardly a controversial proposition, and the legislative history of the new Act contains abundant and unequivocal evidence that Congress endorsed it.[12] It is therefore plainly wrong to suggest that Congress jettisoned the common sense notion that in construing Section 403(d)(3), courts should take into account the Agency's need to maintain the perception that it can be trusted to keep its sources' identities secret.

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[10] Respondents also frequently repeat the erroneous argument that the CIA is seeking "unreviewable" discretion to withhold documents and is in effect seeking complete exemption from the FOIA. See, *e.g.*, Resp. Br. 7, 11, 13, 24, 33-35; Resp. Supp. Br. 3, 8-10. We have previously answered this argument. See Reply Br. 6-7; Pet. Br. 38.

[11] The new legislation does not apply to this litigation because it applies only to civil actions filed on or after February 7, 1984 (Section 4). In addition, because MKULTRA was subject to an investigation by Congress and others, under the new legislation even operational files pertaining to MKULTRA would have to be searched (Section 2(a), adding 50 U.S.C. 701(c)(3)).

[12] See, *e.g.*, S. Rep. 98-305, 98th Cong., 1st Sess. 12 (1983) ("This bill is also crucial from a national security perspective

Respondents are correct in asserting (Resp. Supp. Br. 6-8) that there was a disagreement among the committees of Congress that considered the new legislation on a question relating to potential intelligence sources' perception of the CIA's ability to keep their identities confidential. But that disagreement concerned whether the fact that the FOIA applies to the CIA *at all* gives rise to a perception among potential

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because it will enhance confidence that intelligence sources and methods are being protected."); *id.* at 16; H.R. Rep. 98-726, 98th Cong., 2d Sess., Pt. 1, at 4 (1984) (One purpose of the proposed legislation was "to provide additional assurance of confidentiality to sources who assist the United States by cooperating with the Central Intelligence Agency."); *id.* at 6 ("The legislation will have the additional benefit[] * * * of providing additional assurance to CIA intelligence sources that public access to government files under America's Freedom of Information Act poses no risk to the confidentiality of their relationship with the United States Government."); *id.* at 9; *id.* at 16 ("A potential source is willing to cooperate with the CIA only if he believes the secrecy of his relationship with the CIA will be protected. If he believes that the CIA cannot provide an ironclad guarantee of secrecy and deliver on that guarantee, he will not cooperate. The critical element in establishing and maintaining the cooperation of a source is the source's perception that he can safely cooperate with the CIA because the CIA can protect the secrecy of the relationship."); *id.* at 17; *id.* at 18; H.R. Rep. 98-726, 98th Cong., 2d Sess., Pt. 2, at 8 (1984) ("If [the new legislation] leads to any improvement in the perception of foreign sources about the ability and willingness of the CIA to protect confidential and sensitive intelligence data, this is a welcome byproduct of the legislation.").

sources that the Agency cannot be trusted and, if so, whether that perception is warranted. Compare S. Rep. 98-305, *supra*, at 16 (proposing a legislative finding that "[t]he full application of the Freedom of Information Act to the Central Intelligence Agency is perceived by individuals who cooperate with the United States Government as a means by which their cooperation and the information they provide may be disclosed") and H.R. Rep. 98-726, *supra*, Pt. 1, at 16-17 with *id.* at 10 and H.R. Rep. 98-726, *supra*, Pt. 2, at 8. Those questions are immaterial to this case, because we have never challenged the applicability of the FOIA to the CIA.

Our submission is that—apart from any "perception" problems created by the FOIA when it is correctly construed to exempt from disclosure the identities of all sources of intelligence—*the court of appeals' decision* threatens to impair the CIA's ability to give the necessary assurances to its sources, because it defines "intelligence sources" in a way that would require the disclosure of sources' identities if the Agency does not demonstrate to a reviewing court's satisfaction that it had to promise confidentiality. Nothing in the legislative history of the new statute remotely calls that proposition into question. It was understood by all concerned that the new legislation did not address the court of appeals' decision in this case or any other questions concerning the definition of "intelligence sources."[10] For this reason, respondents' further contention (Resp. Supp. Br. 3, 8) that Congress believed the new legislation would remedy whatever "perception" problems arose from the fact that the CIA is subject to the FOIA is—even if correct—also irrelevant; Congress was not attempting to remedy the problems that might arise from the court of appeals' decision in this case. On the contrary, as we have previously noted (Reply Br. 8), the legislation was premised on the assumption that Exemption 3 of the FOIA and Section 403(d)(3) broadly exempt from disclosure all information that would reveal the identities of intelligence sources. See, *e.g.*, S. Rep. 98-305, *supra*, at 13, 21, 21-22, 23 (quoted at Reply Br. 8); H.R. Rep. 98-726, *supra*, Pt. 1, at 5 ("Exemption 3 * * * exempt[s] from disclosure * * * information relating to intelligence sources and methods"); *id.* at 13 ("The FOIA currently contains exemptions from disclosure for agency records * * * which would compromise intelligence sources or methods, and the CIA has never been forced in litigation * * * to disclose information which the Agency believed to be within these exemptions."); *id.* at 15-16 ("[T]he existing Freedom of Information Act contains exemptions which would enable the CIA to withhold * * * information" that would "enable[] a hostile intelligence service to identify a CIA source"); *id.* at 17-18; H.R. Rep. 98-726, *supra*, Pt. 2, at 5 ("[M]any of [the CIA's] records have always been exempt from disclosure because the information in these records * * * would reveal intelligence sources or methods."); *id.* at 8.

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[10] See, *e.g.*, *Legislation to Modify the Application of the Freedom of Information Act to the Central Intelligence Agency: Hearing Before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence*, 98th Cong., 2d Sess. 22, 26 (1984) (remarks of Rep. Goodling and testimony of CIA officials Mayerfeld and Moffett); *id.* at 43 (statement of

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Mark H. Lynch on behalf of the American Civil Liberties Union) ("[O]ne of the reasons this bill is not highly controversial is that it does not address the substantive scope of the FOIA's exemptions from disclosure.").

## CONCLUSION

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1984

☆ U. S. [illegible]